2011

Salt Lake County v. Butler Crockett and Walsh : Brief of Appellant

Utah Court of Appeals

THE UTAH COURT OF APPEALS

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SALT LAKE COUNTY,	:	
Plaintiff-Appellee,	:	COURT OF APPEALS CASE NO. 20110856
vs.	:	
BUTLER CROCKETT AND WALSH	:	DISTRICT COURT CASE NO. 070913769
Defendant-Appellant	:	

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BRIEF OF THE APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

HONORABLE ROBERT FAUST

PRESIDING

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ORAL ARGUMENT REQUESTED
PUBLICATION REQUESTED

NAMES OF ALL PARTIES

THE NAMES OF ALL PARTIES APPEAR IN THE CAPTION OF THE CASE

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STATEMENT SHOWING JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to 78A-4-103(2)(j).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Whether attorneys fees are recoverable in an action is a question of law, which the Appellate Court reviews for correctness. Valcarce vs. Fitzgerald, 961 P.2d 305 (Utah, 1998

This issue was raised at the Trial Court Level at Record 1363 and following.

CONSTITUTIONAL PROVISIONS

THE UNITED STATES CONSTITUTION

The Fifth Amendment to the United States Constitution provides:

"No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE UTAH STATE CONSTITUTION

Section 22 of the Utah State Constitution provides:

"Private property shall not be taken or damaged for public use without just compensation."

STATEMENT OF THE CASE

NATURE OF THE CASE

The Nature of the Case in this Appeal is very simple and straight forward and that is whether the Trial Court should have awarded attorneys fees and all costs incurred to the Defendant. Appellant submits that attorneys fees should have been awarded for several reasons based upon two statutory provisions and also under the Utah State Constitution as well as the United States Constitution.

COURSE OF PROCEEDINGS

In this action the Plaintiff filed a complaint seeking Defendant's property. After the Complaint was served, Plaintiff sought an Order of Immediate Occupancy so that they could have possession of the Defendant's property and proceed with their development. The District Court Judge took four days of evidence and then denied the Motion for Immediate Occupancy.

Salt Lake County then moved to dismiss the case which the Court granted.

The District Court then ruled that the Defendant was entitled to Attorneys Fees and Costs.

Salt Lake County then immediately moved the Court to set aside its own Order of Dismissal and to allow Salt Lake County to file an Amended Complaint.

The Trial Court granted both motions and then heard the Amended Complaint on the merits and after considering all of the facts and the law, dismissed the Plaintiff's Complaint with prejudice.

DISPOSITION IN THE TRIAL COURT

The Trial Court granted limited costs and no attorneys fees to the Defendant.

STATEMENT OF THE FACTS

1. Plaintiff filed a Complaint on September 24, 2007[1] seeking to condemn 0.018 acres[2] of Defendant's property[3] located on Lot #1, Block 9, The Groves Subdivision,[4] for an alleged purpose of creating a safer turnaround[5] for vehicles coming to the end of the road in Pinecrest, Emigration Canyon, Salt Lake County, State of Utah.

2. Defendant, Butler Crockett and Walsh Development Corporation was served with the Summons on September 24, 2007[6] and so from date of service to the time of the final Order, Judgment and Decree being signed by the Honorable Robert Faust, on August 16, 2011,[7] (Tab C) Salt Lake County had tied up the Defendant's water tanks, water works and hundreds of Defendant's residential lots for almost four (4) years.[8] (Tab I, Finding #11)

3. The matter came on for hearing on the Plaintiff's Motion for Immediate Occupancy on May 8, 2008,[9] May 9, 2008,[10]June 6, 2008[11] and June 10, 2008.[12]

4. Following this evidentiary hearing, the Court denied the Motion for Immediate Occupancy[13] and after making numerous Findings of Fact, made the following Conclusions of Law[14] as to **location** of the subject turnaround on Defendant's property: (Tab I)

> "25. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has not located the subject turnaround in a manner which will be most compatible with the least private injury, as required by 78-34-5 of the Utah Code Annotated.

26. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has not located the subject turnaround in a manner which will be most compatible with the greatest public good as required by 78-34-5 of the Utah Code Annotated.

27. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has acted arbitrarily as contemplated in Salt Lake County vs. Rammoselli, 567 P.2d 182 (Utah, 1977).

28. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because there is no need for the taking and the taking is not necessary as contemplated in Salt Lake County vs. Rammoselli, 567 P.2d 182 (Utah, 1977) and as set out in the Utah Code Annotated 78-34-4.

29. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has abused its discretion in the proposed taking as contemplated in Bountiful vs. Swift, 535 P.2d 1236 (Utah, 1975).

30. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has not acted reasonably nor in good faith in the proposed taking as contemplated in UDOT vs. Fuller, 603 P.2d 814, (Utah, 1979) also Bountiful vs. Swift, 535 P.2d 1236 (Utah, 1975)."

5. After the Trial Court's ruling, Salt Lake County moved the Court to dismiss the action without prejudice[15] (Tab G) which the Court granted and then the Court awarded costs and attorneys fees to the Defendant pursuant to 78-34-16 of the Utah Code Annotated.[16]

6. Before the Trial Court determined the amount of fees and costs that were to be awarded to the Defendant, Salt Lake County moved to set aside their Order of Dismissal and moved to amend their Complaint.[17]

7. The Amended Complaint changed the size and shape of the proposed taking to the sum of 0.003 acre,[18] but still **located** the same over the Defendant's property exactly where it would tie up the Defendant's water tanks, water works and hundreds of Defendant's residential lots.[19] (Tab X)

8. The Trial Court then completed this matter by having a trial on all remaining issues on February 16[20] and 17,[21] 2011.

9. On March 15, 2011, the Trial Court made the following ruling:[22]

> "...the Court finds that the County's amended design of the proposed turnaround is not the most compatible with the greatest public good and the least private injury and was done without adequately considering the impact on the adjoining lands, use of adjoining land to effectuate a turnaround, the water system currently in place, and the parking situation and its impact on future development." (Tab F)

10. Defendant thereafter sought attorneys fees and costs[23] and the trial court granted limited costs and no attorneys fees[24] (Tab D) from which the Defendant appeals.[25] (Tab B)

SUMMARY OF THE ARGUMENTS

This case is about attorneys fees and costs in an eminent domain action. Plaintiff brought this action seeking 0.018 acre of the Defendant's property which was squarely over the Defendant's water tanks and water works. Five sixths of this proposed taking was for snow storage.

The Trial Court conducted an evidentiary hearing over the course of four days and then denied the Plaintiff's Motion for Immediate Occupancy and in doing so, entered Conclusions of Law that Salt Lake County (1)"has not acted reasonably nor in good faith;" (2) "has abused its discretion" (3) not established a "need for the taking and the taking is not necessary;" (4) "has acted arbitrarily" (5) "has not located the subject turnaround in a manner which will be most compatible with the greatest public good" and (6) "has not located the subject turnaround in a manner which will be most compatible with the least private injury."

Plaintiff then moved to dismiss without prejudice and the Trial Court dismissed the action and awarded attorneys fees to the Defendant pursuant to 78-34-16 Utah Code Annotated. Before the Trial Court determined the amount of the fees, Salt Lake County moved to set aside its Order of Dismissal and amend its Complaint and the Trial Court granted the same.

The Amended Complaint sought 0.003 acre of the Defendant's property which was pinpoint right over the water tanks and water works and this time not seeking any of Defendant's property for snow storage.

The Trial Court conducted the trial on February 16 and 17, 2011 and then dismissed the Plaintiff's Complaint with prejudice.

At the Trial Court level Defendant sought attorneys fees and costs and the Trial Court granted limited costs and no attorneys fees, from which Order the Defendant appeals.

Appellant argues that it is entitled to attorneys fees and costs in seven different arguments and then an eighth argument for attorneys fees and costs on appeal.

Argument One seeks attorneys fees on the basis that the action was without merit and not brought or asserted in good faith.

This Argument, made pursuant to 78-27-56 Utah Code Annotated, is based upon the finding by the Trial Court that the action was unmeritorious and that Salt Lake County had not acted in good faith as reflected in the Sixth Conclusion of Law, which states:

30. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has not acted reasonably nor in good faith in the proposed taking as contemplated in UDOT vs. Fuller, 603 P.2d 814, (Utah, 1979) also Bountiful vs. Swift, 535 P.2d 1236 (Utah, 1975).

Argument Two seeks attorneys fees on the basis of 78-34-15 Utah Code Annotated, which was the same basis the Trial Court granted attorneys fees after the Motion for Immediate Occupancy was denied.

Appellant claims that the action of Salt Lake County to amend its complaint and seek 0.003 acre was merely a pretext to get around the provisions of 78-34-16 Utah Code Annotated.

Argument Three seeks attorneys fees on the basis of 78-27-56 Utah Code Annotated and Cady vs. Johnson, 671 P.2d 149 (Utah, 1983) on the basis that the action was without merit and not asserted in good faith during the course of the litigation, including but not limited to: (1) Salt Lake County did not have an honest belief in the propriety of their activities during the course of the trial; (2) Salt Lake County fully intended to take unconscionable advantage of Defendant and (3) Salt Lake County clearly intended to and had knowledge of the fact that its actions would hinder, delay and defraud the Defendant.

Appellant claims that there was no witness, no exhibit, no report, no study, etc., not even a scintilla of evidence to support the need for the 0.003 acre right over the water tanks and water works of the Defendant.

Appellant submits that the stemming from the Court when the Court denied the Motion for Immediate Occupancy is almost word for word the same as the Court ruled on the whole matter on the merits.

Please note that Salt Lake County withdrew its claim for snow storage and snow removal after the Motion for Immediate Occupancy was denied.

At the end of the first four days of trial, the Honorable Robert Faust, wrote in his Minute Entry at page 480B of the Record:

> "After weighing the testimony and evidence that was presented at the hearing, the Court finds that the County designed the proposed turnaround without adequately considering the impact on the adjoining land, the water systems currently in place, the burden of additional snow storage on the Defendant's property, and the parking situation and its resulting impact on further development."

At the end of the fifth and sixth days of trial, the Honorable Robert Faust, wrote in his Minute Entry at page 1360 of the Record: (Note Salt Lake County withdrew its claim of need for snow storage.)[xxvi]

> "After weighing the testimony and evidence that was presented at the hearing, the Court finds that the County's amended design of the proposed turnaround is not the most compatible with the greatest public good and the least private injury and was done without adequately considering the impact on the adjoining lands, use of adjoining lands to effectuate a turnaround, the water system currently in place, and the parking situation and its impact on future development."

Appellant submits that there should be no wonder why the Trial Court ruled the same as there was no difference in the "testimony and evidence" as Andrea Pullos merely memorized the words, "greatest public good and the least private injury" and other than this, there was nothing different submitted to the Court.

Argument Four seeks attorneys fees on the basis of 78-27-56 Utah Code Annotated and Cady vs. Johnson, 671 P.2d 149 (Utah, 1983) on the basis that the action was without merit and not asserted in good faith outside of the litigation, including but not limited to: (1) Salt Lake County did not have an honest belief in the propriety of their activities during the course of the trial; (2) Salt Lake County fully intended to take unconscionable advantage of Defendant and (3) Salt Lake County clearly intended to and had knowledge of the fact that its actions would hinder, delay and defraud the Defendant.

Argument Five seeks attorneys fees on the basis that Salt Lake County has a history of abuse in reference to the exercise of its power of eminent domain.

Here the Appellant produced uncontroverted evidence of how Salt Lake County had sought to harm the Defendant over the course of fifteen years plus through several eminent domain actions.

Lonnie Johnson, Administrative Assistant to Salt Lake County Councilman at Large, Randy Horiuchi, testified that this action "was unfair because it was part of harassment against Walsh by the County" for more than 15 years. This too was uncontroverted.

Argument Sixth seeks attorneys fees on the basis of the Fifth Amendment and Fourteenth Amendment of the United States Constitution.

Appellant claims that this action amounts to an unconstitutional taking without just compensation and that it deprives the Defendant of its property without due process of law.

Argument Seven seeks attorneys fees on the basis of Section 22 of the Utah State Constitution which states, "Private property shall not be taken or damaged for public use without just compensation.

This argument is based upon the fact that Salt Lake County significantly damaged the Defendant by tying up its water tanks, water works and the development of hundreds of its residential lots for almost four years. Appellant claims that these four years started when the real estate market was at an all time high and ended with the market at an all time low and therefore the damages to the Defendant are permanent and "astronomical" (Note Finding of Fact #19).

Argument Eight seeks attorneys fees and costs on appeal.

This is based upon the claim that attorneys fees should have been awarded by the Trial Court and if awarded at the lower Court level then they should also be awarded on appeal.

Appellant submits that it is most significant that it was Andrea Pullos herself, the Traffic Engineer from Salt Lake County, who provided the Court with the evidence that defeated the Motion for Immediate Occupancy. (Tab I)

Similarly, it was Andrea Pullos' notes, obtained by the Defendant through discovery that provided the Court with the evidence that caused the Court to dismiss Salt Lake County's Complaint with prejudice. (Tab X and Tab Z)

It has been Lonnie Johnson, Administrative Assistant to Randy Horiuchi, Salt Lake County Councilman at Large, who supplied the Court with the evidence that this action was asserted subjectively in bad faith.

ARGUMENT ONE

THE AWARD OF ATTORNEYS FEES AND COSTS AFTER THE COURT DENIED THE MOTION FOR IMMEDIATE OCCUPANCY WAS WELL FOUNDED IN BOTH THE LAW AND THE FACTS

The action to take land from a landowner and substitute money for the same should never be taken lightly.

The Trial Court Judge took this matter very seriously and even took his Bailiff and went up to the subject property and studied the problem very carefully[26] and then after four (4) days of taking evidence[27] and after making extensive Findings of Fact[28] the Court concluded as a matter of law: (Tab I)

1. That Salt Lake County had not located the subject turnaround in a manner which will be most compatible with the least private injury, as required by 78-34-5 of the Utah Code Annotated.

2. That Salt Lake County had not located the subject turnaround in a manner which will be most compatible with the greatest public good as required by 78-34-5 of the Utah Code Annotated.

3. That Salt Lake County has acted arbitrarily as contemplated in Salt Lake County vs. Rammoselli, 567 P.2d 182 (Utah, 1977).

4. That the Order of Immediate Occupancy should be denied because there is no need for the taking and the taking is not necessary as contemplated in Salt Lake County vs. Rammoselli, 567 P.2d 182 (Utah, 1977) and as set out in the Utah Code Annotated 78-34-4.

5. That Salt Lake County had abused its discretion in the proposed taking as contemplated in Bountiful vs. Swift, 535 P.2d 1236 (Utah, 1975).

6. That Salt Lake County had not acted reasonably nor in good faith in the proposed taking as contemplated in UDOT vs. Fuller, 603 P.2d 814, (Utah, 1979) also Bountiful vs. Swift, 535 P.2d 1236 (Utah, 1975).[29]

Counsel submits that it is one thing for the Trial Court to determine that Salt Lake County had not located the subject turnaround in a manner which would be most compatible with the least private injury along with the greatest public good as required by 78-34-5[30] of the Utah Code Annotated, thereby substituting the Court's judgment for that of the Salt Lake County Council,[31] however, it is all together a different thing for the Trial Court to substitute its judgment for that of the County Council on the basis that Salt Lake County abused its discretion, acted arbitrarily, had not acted reasonably nor in good faith.[32]

These Conclusions of Law were not made in a vacuum, they were made by the Court after making many Findings of Fact[33] most of which were based on the testimony of Andrea Pullos, Salt Lake County Traffic Engineer,[34] who designed the proposed Turnaround.[35]

The Trial Court made many Findings of Fact[36] in support of the Conclusions of Law,[37] as noted in Tab 1, in the Addendum.

In the Utah Supreme Court case of *In re Discipline of Sonnenreich*, 86 P.3d 712 (Utah 2004) the Court held at page 725:

> "Section 78-27-56 of the Utah Code provides as follows: "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith…" Utah Code Annotated 78-27-56(1)(2002). Whether a claim is "without merit" is a question of law and we review it for correctness. *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah Ct. App. 1991). Whether a claim is "not (been) brought or asserted in good faith" is a question of fact and we review under a clearly erroneous standard."

In the Utah Supreme Court case of *Cady vs. Johnson*, 671 P.2d 149 (Utah 1983) the Court stated beginning on page 151, "While there may be a distinction between bad faith and 'lack of good faith' in other areas of the law, for purposes of U.C.A., 1953, Section 78-27-56, the two terms are synonymous."

Counsel for the Appellant respectfully submits that the Findings of Fact and the Conclusions of Law that Salt Lake County abused its discretion, acted arbitrarily, had not acted reasonably nor in good faith is well founded and clearly established the requisite basis for attorney fees pursuant to 78-27-56 Utah Code Annotated.

ARGUMENT TWO

THE TRIAL COURT INITIALLY AWARDED ATTORNEYS FEES AND THE CHANGE OF THE SIZE AND SHAPE OF THE TAKING DID NOT CHANGE THE BASIS FOR THE AWARD OF ATTORNEYS FEES

Appellant submits that when it comes to the value of land, the top three criteria are location, location and then lastly, location.

The nature of eminent domain is based upon the notion that the ultimate power over property rests with the State and the State is entitled to just take any land they determine they want and the land owner is forced to substitute money for the same.

The right to own property is so fundamental that it is basic to human existence, that we are endowed by our creator with certain inalienable rights such as the right to own property.[38]

When the State exercises its right of eminent domain it acts on its citizens and trumps "God given rights."

Here Salt Lake County initially sought to "take" 787 square feet of the Defendant's land[39] where the Defendant already had placed water tanks and a water system that would supply water to hundreds of Defendant's residential lots.[40] (Tab S)

When Salt Lake County changed the size and shape of the "taking"[41] Salt Lake County did nothing to mitigate the damages to the Defendant, as it continued exactly as before, to tie up the Defendant's water tanks, water works and hundreds of Defendant's residential lots. (Tab X)

The only difference between the initial take of 0.018 acre[42] and the 0.003[43] acre was an acknowledgement that the original proposed taking was in bad faith as Salt Lake County openly admitted that Salt Lake County only needed a fraction of the 0.018 acre for road purposes, but they were taking more than needed so that they could "store snow"[44] on the balance of the land they were taking. (Note Argument Three and Argument Four below regarding the "bad faith" of the same)

Here Salt Lake County changed their Complaint and the taking of 0.018 acre[45] and then filed an Amended Complaint seeking to take 0.003 acre **abandoning the original claim by five-sixths.**

The Utah State Legislature enacted the provisions of 78-34-16 of the Utah Code Annotated, as amended in 1967,[46] that addressed this exact situation where the condemnor abandons its claims after putting the landowner to enormous costs and attorneys fees.

The Utah Supreme Court first addressed this provision in 1972, in the case of Provo City Corporation vs. Cropper, 497 P.2d 629, (Utah, 1972) where the Court awarded fees and costs, in a case where the condemnor abandoned its claims. Note also Cornish Town vs. Koller, 817 P.2d 305 (Utah, 1991).

It is clear from the Supreme Court that this statute provides for the recovery of "every conceivable expense, damage and costs" including attorneys fees. Note Provo City above.

Defendant has been required to engage the services of a second law firm of Anderson, Call and Wilkinson[47] as the County required the same,[48] so that they could force Counsel herein to take the witness stand and provide testimony for the County.[49]

After the Trial Court awarded fees[50] but before the Trial Court determined the amount[51] Salt Lake County moved the Court to set aside the voluntary dismissal filed by Salt Lake County[52] (Tab G) along with a Motion to Amend the Complaint.[53]

Defendant submits that the effort to amend the Complaint[54] and proceed with two more days of trial on February 16 and 17, 2011[55] involving the taking of a mere 0.003 acre was in bad faith for several reasons:

a. The location of the taking of a mere 0.003 acre could not possibly be more injurious to the Defendant[56] as it squarely involved the water tanks and the water works of the Defendant,[57](Tab X) thereby affecting the developability of hundreds of Defendant's residential lots.

b. Salt Lake County did not submit a single exhibit to the Court to support any kind of need for any part of Lot #1.[58]

c. Salt Lake County had not done a single study, report or analysis to support the 0.003 purportedly needed.[59]

d. Salt Lake County did not have a single person from the many departments within Public Works[60] to testify that after the improvements made following day four of trial, Salt Lake County still needed any part of the said 0.003 acre.[61]

e. Salt Lake County did not produce a single expert witness that supported the claim that Salt Lake County needed to take any part of the 0.003 acre from Defendant.[62]

f. Salt Lake County Traffic Engineer, Andrea Pullos did not even go look at the property with the associated water tanks, water works, etc., after the Motion for Immediate Occupancy was denied and before creating the redesign which was the subject of the Amended Complaint.[63]

g. Salt Lake County Traffic Engineer, Andrea Pullos did not factor in the Findings of Fact and Conclusions of Law already in place when she created the redesign which were the subject of the Amended Complaint.[64] (Tab I)

h. Salt Lake County did not factor the points established on cross examination of Andrea Pullos when redesigning the turnaround which was the subject of the Amended Complaint.[65]

Appellant submits that the list could go on and on about the bad faith involving the 0.003 acre involved in this matter.[66]

Appellant also submits that it is perhaps best stated that Salt Lake County took the position that it is the landowners burden of proof to show that Salt Lake County did not need the 0.003 acre rather than it being the burden of the Condemnor.[67]

Yet, according to Judge Robert Faust, it was Salt Lake County's own documents, which Defendant obtained through discovery, that supported the Defendant's claim that Salt Lake County did not need the 0.003 acre at all.[68] (Tabs X and Z)

At page 1360 of the Record is the Ruling by Judge Faust following the sixth day of trial. (Tab F) In the ruling the Court refers to Defendant's Exhibit #159 (Tab X) and Defendant's Exhibit #169E (Tab Z) as the basis to deny the claims of Salt Lake County and to dismiss the action with prejudice.

The bottom line, as determined by Judge Faust was the Salt Lake County could not back up a 43 foot snow plow into a 21 foot space, which was the distance between the corner of Lot #1 and the gate, and therefore the claims by Salt Lake County were without merit.[69]

Additionally, as reflected in the Salt Lake County Fire Code in Defendant's Exhibit #4, (Tab K) Salt Lake County would need 60 feet to create a hammerhead turnaround for fire trucks. Hence the 21 foot feet from the corner of Lot #1 to Gate was not even close to the 60 feet required by the Fire Code.[70] (Tab X)

Appellant submits here, just as it did before Trial Court,[71] that the trial on February 16 and 17, 2011 was merely a pretense to get around the provisions of 78-34-16 of the Utah Code Annotated, as amended in 1967 which provides for attorneys fees and costs when the Condemnor abandons the litigation after the landowner expends substantial attorneys fees and costs to defend the subject condemnation.

Appellant respectfully submits that the only difference between the first four days of trial, regarding the proposed taking of 0.018 acre and the last two days of trial,

regarding the proposed taking of 0.003 acre, was Andrea Pullos, Salt Lake County Traffic Engineer merely memorized the words "the least private injury with the greatest public good."[72]

Defendant claimed the same at the Trial Court level at page 1302 of the record:

> All that the Plaintiff can claim is that Andrea Pullos has worked on saying the right words, as found at page 9 of her deposition:
>
> > Q. So when you put the design together in Exhibit 159, tell me what you used then, to come up with this configuration, please.
> >
> > A. I took the information I had gained from the trial and the suggestion – and discussion with my attorney about the – hopefully I'll get this right – the most public good with the least private impact. …"
>
> Hence the only difference between the four days of trial and the upcoming trial is Andrea Pullos will be giving a **conclusion**, "the most public good with the least private impact." **as each and every FINDING OF FACT will remain unchanged."** (Emphasis original)

Appellant respectfully submits that there was no need at all for the trial on February 16 and 17, 2011,[73] and therefore this Court should hold Salt Lake County accountable under the provisions of 78-34-16 of the Utah Code Annotated, as amended in 1967 and award the Defendants their Attorneys Fees and Costs in defending the same.

Salt Lake County acknowledged that there was no need for the continued trial after the Motion for Immediate Occupancy was denied.[74]

Beginning at page 615 of the Record, Salt Lake County took the following position before the Trial Court:

> "Here, the County – like Provo City in the foregoing case – could have simply done nothing at all, thereby forcing BCW or the court to formalize the final disposition of this action, thereby averting a possible attorneys fee award.

However, to do so would only impose on both parties additional delay, time, and expense, and would require further unnecessary court intervention."

After the Court granted the Defendant Attorneys Fees, Salt Lake County did exactly what it said it would not do in that it "impose(d) on both parties additional delay, time, and expense and (did) require further unnecessary court intervention."[75]

By virtue of the foregoing, Appellant respectfully requests that this Court award Defendant appropriate attorneys fees and costs.

ARGUMENT THREE

DEFENDANT SHOULD BE AWARDED ATTORNEYS FEES AND COSTS FOR THE CONDUCT OF SALT LAKE COUNTY DURING THE LITIGATION

This claim for Attorneys Fees is based upon the provisions of 78-27-56, Utah Code Annotated, as amended in 1953, which provides:

> "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith ..."

Appellant submits that the language is mandatory as the Trial Court, "shall" award fees if the party meets the other criteria.

As to the provision, "that the action or defense to the action was without merit" is well founded in the FINDINGS OF FACT and CONCLUSIONS OF LAW made and entered by the Trial Judge at the close of the evidence, after four days of testimony and 150 (approximate) exhibits.[76] This is the case based as well on the MINUTE ENTRY, at the end of the six days of Trial, wherein the Trial Judge ruled:[77]

"After weighing the testimony and evidence that was presented at the hearing, the Court finds that the County's amended design of the proposed turnaround is not the most compatible with the greatest public good and the least private injury and was done without adequately considering the impact on the adjoining lands, use of the adjoining lands to effectuate a turnaround, the water system currently in place, and the parking situation and its impact on future development."

Appellant submits that these seven (7) separate grounds for dismissing Plaintiff's Complaint, at the close of six days of trial are really no different than the six (6) CONCLUSIONS OF LAW entered by the Court following the first four days of trial, wherein the Court concluded as a matter of law that the County's Motion for Immediate Occupancy should be denied.[78]

Appellant respectfully submits that the error by the Trial Court Judge was on the issue of "not brought or asserted in good faith."

Appellant submits that the sixth CONCLUSION OF LAW is dispositive on this issue:

"30. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has not acted reasonably nor in good faith in the proposed taking as contemplated in UDOT vs. Fuller, 603 P.2d 814, (Utah, 1979) also Bountiful vs. Swift, 535 P.2d 1236 (Utah, 1975)." (Tab I)

The controlling case on the issue of bad faith, is Cady vs. Johnson, 671 P.2d 149 (Utah, 1983), wherein the Utah Supreme Court stated on pages 151 and 152:

"The statute is narrowly drawn. It was not meant to be applied to all prevailing parties in all civil suits. To safeguard against too broad an application, two elements are required in addition to being a prevailing party. First, the claim must be "without merit." We have not heretofore had occasion to define this term. However, under a provision of the Federal Securities Act which awards attorney's fees "if the court believes the suit or defense to have been without merit," it was stated in *Can-Am Petroleum Co. v. Beck,* (10th Cir.1964), that the term implies bordering on frivolity. The dictionary definition of "frivolous" is "of little weight

or importance having no basis in law or fact." While there may be some distinction between these two terms in other areas of the law, for purposes of this statute we believe the terms are synonymous. While this definition may lack some of the nuances found in common law definitions, it adequately serves the purpose of the statute before us and is clearly understood. See Morton v. Allied Stores Corp., 90 F.R.D. 352 (D.Colo.1981). In the instant case, the plaintiffs clearly had no legal basis for recovery of additional damages after the Cadys had retained the earnest money deposit, Andreasen v. Hansen, supra, and in face of the statute of frauds. Therefore, we affirm the trial court's finding that the claim was "without merit."

In addition to finding the claim to lack merit, the trial court must also find that plaintiffs' conduct in bringing suit was lacking in good faith. In *Tacoma Assoc. of Credit Men v. Lester,* 72 Wash.2d 453, 458, 433 P.2d 901, 904 (1967), the court defined "good faith" as:

(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay or defraud others.

To establish lack of good faith, one must prove that one or more of these factors is lacking. *Sparkman and McLean Co. v. Derber,* 4 Wash.App. 341, 481 P.2d 585 (1971).

The federal courts offer a similar definition, however, inversely stated. Bad faith must be found in order to award attorney's fees to a prevailing party. See *Kinnear-Weed Corp. v. Humble Oil & Refining Co.,* 441 F.2d 631 (5th Cir.1971); *Cleveland v. Second Nat'l Bank & Trust Co.,* 149 F.2d 466 (6th Cir.1945). Bad faith is found when one of the three elements heretofore stated is lacking. While there may be a distinction between bad faith and "lack of good faith" in other areas of the law, for purposes of U.C.A., 1953, § 78-27-56, the two terms are synonymous."

Appellant submits that the actions of Salt Lake County herein, were in bad faith for the following reasons:

A. SALT LAKE COUNTY DID NOT HAVE AN HONEST BELIEF IN THE PROPRIETY OF THEIR ACTIVITIES DURING THE COURSE OF THE TRIAL.

a. After the Court ruled following the first four days of trial that the Motion for Immediate Occupancy be denied, Salt Lake County could have ended the matter and

mitigated the damages and losses of the Defendant. Instead, Salt Lake County proceeded to the second round for day five and day six of trial.[79]

In day five and day six of trial Salt Lake County did not provide the trial Court with a single exhibit in support their claim for any need of any part of Lot 1, Block 9, The Groves.[80]

In day five and day six of trial Salt Lake County did not produce a single witness, expert or otherwise to support the claim that Salt Lake County needed any part of Lot 1, Block 9, The Groves Subdivision wherein Salt Lake County was determined to take 0.003 acre right over Defendant's water tanks and water works.[81] (Tab X)

In day five and day six of trial Salt Lake County did not provide the Trial Court with a single study, analysis or investigation of any kind, in support of any purported need to take any part of Lot 1, Block 9, The Groves Subdivision.[82]

After the Court heard and ruled on the Motion for Immediate Occupancy on July 15, 2008 there was a significant amount of time before the Court proceeded to hear the balance of the matter on February 16 and 17, 2011, like over two and one-half years.

During this two and one-half year period, Salt Lake County significantly modified the turnaround area by placing a 60 foot culvert, bringing in fill and blacktopping, etc.[83]

During day five and six of trial, Salt Lake County did not produce a single exhibit, study, witness or even a shred of evidence that this modified turnaround was not working perfectly.[84]

Salt Lake County did not have an honest belief as Salt Lake County did not provide the Trial Court with a scintilla of evidence[85] to support any need whatsoever to take the 0.003 acre critically located over Defendant's water tanks and water works.

b. Salt Lake County did not have an honest belief of their activities in reference to the water tanks on Lot 1, Block 9, The Groves Subdivision.

On day five of trial, Andrea Pullos, the Salt Lake County Traffic Engineer who designed the original proposal as well as the amended proposal testified under direct examination by Donald Hansen as follows:

Q. Did you have any other knowledge with regard to the exact location and orientation of those water tanks as they were buried under ground?
A. No.
Q. To your knowledge has the county ever been provided by Mr. Walsh, with a drawing, a schematic, a map, anything that would indicate the exact size, depth, location and orientation of those water tanks, where they lie underground?
A. Not prior to this design, no. [86]

The apparent relevance of this is since Defendant did not provide Salt Lake County information regarding the location of the tanks, any injury to Defendant would be of their own making.

Appellant has several problems with this as there are many reasons why this evidence is submitted in bad faith:

1. The lids to the water tanks are above ground and plainly visible to anyone who would take the time to just look at them.[87] Appellant submits that this is a classic example of what Salt Lake County did in this action, which was, "If I do not go look at the proposed turnaround then I can claim that there are all kinds of problems with designing a turnaround that would not harm the Defendant."[88]

Even Judge Faust personally observed the lids when he did his sight visit after the first day of trial.

2. As reflected in the transcript of day three of trial, Defendant had in fact taken Michael Leon Barrett, Operations Manager for Salt Lake County Public Works, on location, opened up the tank and proceeded to assist Salt Lake County in a full and complete inspection of the water tanks and water works.[89]

Hence the claim that Defendant did not supply information to Salt Lake County was wholly untrue and Salt Lake County knew this as Mr. Barrett was not only a Salt Lake County employee, he actually testified in the matter on behalf of the Plaintiff shortly after Defendant took him to the tanks for Salt Lake County's own inspection.[90]

3. Defendant's Exhibits #169G, #169H and #169I, which were admitted into evidence without objection shows the pictures taken by Mr. Barrett showing the lids on the tanks, ladder, etc., conclusively establishing that Defendant did in fact submit the information to Plaintiff as well as the obvious water tanks, visible to anyone who would merely take the time to go look.[91]

4. Appellant submits that perhaps the most significant bad faith regarding the water tanks and water works is found in position taken by Salt Lake County before and after the Motion for Immediate Occupancy was denied.[92]

Mr. Barrett testified on day three of Trial,[93] when Salt Lake County wanted the Trial Court to rule that the water tanks are fine and Salt Lake County can design and build the road and turnaround right over the top of them without damaging them, etc.:

Q. (By Mr. Hansen) In terms of the physical condition of the water tanks, how would you describe them? Beyond what you've already said.

A. I'd say they were in excellent condition. I didn't see any degradation. Just the minor cracking in the roof.

However, when the issue comes up as to compensating the Defendant for the tanks, on day five of trial, Salt Lake County puts on Shane Ellis,[94] Engineer with Salt Lake County Flood Control Department to have him testify about the tanks as follows:

"That they are in a state of failure and that they can't handle the loads that are currently on them with just the soil and water …"[95]

"So I would say if this was a clean water tank that you were trying to store culinary water in, yes, it's past its useful life."[96]

Appellant submits that Salt Lake County cannot have an honest belief in the propriety of their actions when they put on evidence that the tanks are in "excellent condition" when they want the Court to rule that they can just design a road and turnaround over the top of them.

However, after the Court denied the Motion for Immediate Occupancy and the Court is then considering compensation to the Defendant, Salt Lake County puts on evidence that the tanks are so far gone that they are "past its useful life."

c. Salt Lake County did not have an honest belief in the propriety of their activities in reference to hammerhead turnarounds.

Andrea Pullos testified that Salt Lake County could not do a hammerhead at Roosevelt Trail and Burrs Lane[97] because Salt Lake County had to factor in snow

coupled with the fact that Salt Lake County had an official policy not to allow hammerheads.

Andrea Pullos further[98] testified that it was the national standard as well as the AASHTO standard not to allow hammerheads.

On the second day of trial, Andrea Pullos testified why it was impossible to do a hammerhead turnaround at the turnaround site:[99]

> "... If I used a standard hammerhead, the legs of the hammerhead need to be 60 feet long and the roadway needs to be 20 feet wide. Roosevelt Trail is only 16 - 1/2 feet and you do not have 60 feet for each leg, you would have to be – cut into the mountains in order to get that." (Tab X)

Defendant's Exhibit No. 4[100] is the Salt Lake County Fire Department official design pattern for roads and turnarounds (Tab K) and shows the 60 foot leg going each direction as described by Andrea Pullos as noted above.

Appellant submits that the "bad faith" by Salt Lake County occurs after the District Court Judge denied the Motion for Immediate Occupancy wherein the County sought a circular turnaround and then Salt Lake County sought to do exactly what they had already testified was impossible to do and which was against the Salt Lake County standard, the national standard and also against the AASHTO standard ie: creates a hammerhead design.[101]

Defendant's Exhibit 168 shows the actual drawing by Andrea Pullos where she testified about how the hammerhead would work for the amended design, which gave rise to day five and day six of trial. This Exhibit shows the vehicle proceeding North on Burrs Lane, then making a left turn to the West onto Roosevelt Trail and then backing out

North towards the gate and then proceeding South down canyon to create the half "H" design.

Defendant's Exhibit 169E[102] shows how this design is a physical impossibility for the following three reasons: (Tab Z)

1. Roosevelt Trail is only 16 - ½ feet wide and not the requisite 20 feet wide required by the Salt Lake County Fire Code.[103]

2. Roosevelt Trail is only 47 plus or minus feet long and not the requisite 60 feet required by the Salt Lake County Fire Code.[104]

3. The distance between the Southeast Corner of Lot #1, Block 9, The Groves Subdivision is only 21 feet[105] to the gate and not the requisite 60 feet required by the Salt Lake County Fire Code.

These Salt Lake County documents, procured by the Defendant through discovery, formed the basis for the Court's ruling ultimately dismissing the Plaintiff's Complaint with prejudice. Note Record at page 1354. (Tab X and Z)

Hence, it was Salt Lake County's own documents that established the fact that the hammerhead turnaround as proposed by Salt Lake County in its amended design, was a physical impossibility.[106]

Hence, Salt Lake County could not have had an honest belief in the amended design as Salt Lake County established in the first four days of trial that it violated Salt Lake County policy established by ordinance[107] the national standards[108] and the AASHTO standards[109] together with the Salt Lake County Fire Code.[110] (Tab K)

It was as basic as one cannot backup a 43 foot long snow plow[111] with only a 21 foot space.

It all boils down to, "If one does not go take a look at it then one can make outrageous claims."

Salt Lake County proposed to do in the amended design what they had established was impossible, legally[112] and physically,[113] when testifying about the original design.

Andrea Pullos did not go look at the subject turnaround even after she was on the stand during the first four days of trial establishing the defects in the County's original design.[114]

A great majority of the FINDINGS OF FACT, following the first four days of trial on the Motion for Immediate Occupancy, supporting the Conclusion that Salt Lake County has not acted reasonably nor in good faith, have Andrea Pullos name in same.[115]

There was just over two and a half years for her to merely go look, but Salt Lake County was determined to take the 0.003 acres over the Defendant's water tanks and water works so there would be no need to go look.[116]

This is born out in the record at page 1302, where she testified that she and her attorney merely worked on her saying the right words:

> Q. So when you put the design together in Exhibit 159, tell me what you used, then, to come up with this configuration, please.
>
> A. I took the information I had gained from the trial and the suggestion – and discussion with my attorney about the – hopefully I'll get this right – the most public good with the least private impact. …"

Appellant submits that this matter is pretty simple, the total basis for the fifth and sixth days of trial, was not producing exhibits, not producing studies, not producing expert witness, etc., or even going and looking at the area, the total basis was Andrea Pullos memorizing the words, " most public good with the least private impact."

Salt Lake County did not have an honest belief in the propriety of the 0.003 acre taking over the water tanks and water works of Defendant.

B. SALT LAKE COUNTY FULLY INTENDED TO TAKE UNCONSCIONABLE ADVANTAGE OF DEFENDANT.

1. Salt Lake County made this matter as cheap as possible for Salt Lake County and as expensive as it could for the Defendant.

When Salt Lake County deposited with the Court the alleged "fair market value" as a condition precedent to the subject taking they only deposited $600.00,[117] even though they acknowledged in the original Complaint that they had not covered the impacts on the water tanks, etc.[118]

In contrast Judge Faust established the damages to be $130,000.00 as reflected in the record at page 1354. (Tab F)

Salt Lake County did not engage a single expert witness, who was not already on the County payroll, and therefore did not have to pay a single expert witness fee.[119]

Salt Lake County did not produce a single Expert Witness Report, as it claimed that it did not need to, because its witnesses were all employees of Salt Lake County.[120]

Salt Lake County refused to cooperate in supplying the Court with the transcripts of the first four days of trial and therefore the Defendant was required to spend tons of money on the transcripts.[121]

In reference to Jerry Webber, MAI, Defendant had engaged him to testify and paid him thousands of dollars for preparation as an Expert Witness.[122] Shortly before trial on day five and day six Defendant learned that Jerry Webber's analysis was flawed due to using comparables that did not exist at the time of the taking and only came into existence after the subject taking[123] and also flawed because he did not factor how the footings on the single family dwelling were impacted by the taking.[124]

By virtue of these critical flaws, Defendant did not call him to testify.

Salt Lake County then subpoenaed Jerry Webber to testify for Salt Lake County paying him only his witness fee,[125] leaving the Defendant paying him thousands of dollars for preparation and Salt Lake County only paying a witness fee,[126] yet reaping the benefit of the thousands paid him by Defendant.

Furthermore, Jerry Webber was the only Expert Witness on value called by Plaintiff, as they did not engage any other Expert Witness on the same.[127]

In the end, Jerry Webber ultimately changed his position in support of Defendant[128] however, Salt Lake County reaped thousands of dollars of benefit, with the Defendant left holding the bag.

Salt Lake County forced the Defendant to engage an additional law firm and then after the Defendant engaged the second law firm at tremendous expense, Salt Lake County abandoned its claims.[129]

This maneuver by Salt Lake County cost the Defendant dearly.

Salt Lake County cost the Defendant tremendous expense by attempting to shift the burden of establishing the burden to the Defendant to show a lack of need for the taking rather than Salt Lake County establishing itself the need for the taking.

Note as just one example the discovery request by Salt Lake County at page 960 of the Record:

> "1. With respect to each of your affirmative defenses (see Answer to Plaintiff's First Amended Complaint for Condemnation, January 8, 2010, Defenses One through Twenty Two (pp.2-4)), please set forth a *separate* detailed statement setting forth every factual and legal basis for each such affirmative defense including but not limited to (a) every witness who has knowledge of the alleged facts, along with each such witness' full name, current home address, current business address, current home telephone, and current business telephone, and (b) every document which relates in any way to such facts and the source of each such document, including the current name, address and telephone numbers of every person(s) who created, authored, edited, and./(sic) or possesses such documents."

Defendant had to file for a Protective Order for this and other discovery abuses by Salt Lake County which cost the Defendant significantly.[130]

In sharp contract Salt Lake County refused to answer discovery requests from the Defendant on the basis that Salt Lake County had counted the Interrogatories with it subparts and decided they totaled more than 25.[131]

This forced the Defendant to take the deposition of Andrea Pullos a second time at great expense to the Defendant.[132]

Defendant filed a Motion for Partial Summary Judgment[133] on the basis that the only difference between the first four days of trial where the Court denied the Motion for

Immediate Occupancy and the upcoming trial was Andrea Pullos admitted that she now had memorized the words, "the most public good with the least private impact."[134]

The Court may well have saved the Defendant significant expense had the Plaintiff filed a good faith response to the Motion for Partial Summary Judgment as the facts as established at the time of trial in day five and day six of trial, were the same facts supporting the Defendant's Motion.[135]

In the case of Valcarce vs. Fitzgerald, 961 P.2d 305 (Utah, 1998), the Utah Supreme Court held that the intent to harass and to increase litigation costs was sufficient bad faith to justify an award of attorneys fees.

C. SALT LAKE COUNTY CLEARLY INTENTED TO AND HAD KNOWLEDGE OF THE FACT THAT ITS ACTIONS WOULD HINDER, DELAY AND DEFRAUD THE DEFENDANT.

Appellant submits that it is most telling that Salt Lake County was going after a teeny tiny 0.003 acre right over the water tanks and water works of the Defendant. (Tab X)

The water tanks and water works were the life's blood for the development of the 400 plus lots of the Defendant.

The Plaintiff tied up the Defendant's project for almost a full four years and has permanently damaged the Defendant as noted below.

Appellant submits that it was the testimony of Andrea Pullos that established that facts as stated in the FINDINGS OF FACT as most of them have her name in them.[136] (Tab I)

It was the testimony of Andrea Pullos that established the CONCLUSIONS OF LAW, that Salt Lake County had acted in bad faith.[137]

Lastly, it was the Salt Lake County's own documents that established the final basis for the Court to dismiss the Plaintiff's Complaint with prejudice.[138] (Tab X and Z)

Hence, it was Salt Lake County's witnesses and documents that formed the basis for the Trial Court to dismiss with prejudice.[139]

Hence, the landowner had to go to tremendous expense to put on a mountain of evidence for the Trial Court to substitute is judgment for that of the Salt Lake County Council on the basis of bad faith.

Now the landowner is left holding the bag with horrific expenses and attorneys fees and the wrongdoer has absolutely no consequence.

Furthermore the landowner has suffered "astronomical" losses due to Salt Lake County tying up the project until the real estate market collapsed.[140]

Salt Lake County made outrageous claims regarding the need for retaining walls[141] and left the burden on the landowner to disprove.[142] Salt Lake County made the claims without a single study, expert witness or investigation of any kind. Pullos did not even go look at it one time for the purpose of the original design[143] nor one time for the amended design,[144] yet continued to the very end with the claim that there had to be mega retaining walls in order to shift the turnaround off of the Defendant's property.[145] (Tab Y)

Perhaps the greatest element that defeated these ridiculous claims was the quality of an outstanding Judge who took the time to go look at the problem in the face where Salt Lake County had not.

The retaining walls scam was a theory throughout the Plaintiff's case. Plaintiff knew of the same as Andrea Pullos provided the testimony to support the facts that there was more than ample ground on the East side of the turnaround to shift the same completely off of the Defendant's property.

Finding of Fact #8 established that there was eight to ten feet of blacktop that was not used and Finding of Fact #9 established an additional ten feet, all to the East, thereby totally avoiding taking any of the Defendant's property altogether. (Tab F)

These FINDINGS were not made in a vacuum, as Andrea Pullos clearly established that there were sufficient flat area for the 75 foot turnaround without doing any excavation. At page 63 and 64 on the third day of trial, she testified on Cross Examination:

> Q. Okay. And can you tell the Court what the distance is then, between those two points?
> A. Approximately 80 feet.
> Q. And you told the Court you needed 75 feet, did you not, earlier today?
> A. Yes
> Q. And so it sits today, you wouldn't have to do any excavation as far as cuts go to put the turnaround then to the east; is that correct?
> A. No.
> Q. Why?
> A. Because you have a driveway in the middle of that area that would impact and – that there would be impacts on that would change how it, it is designed.
> THE COURT: As I'm understanding it for the cul-de-sac section itself would remain flat, but it's the takeoff there from that's the problem. And frankly, as I mentioned last time to both counsel, I still didn't quite fully grasp why your were thinking there needed to be this retaining wall on the side of the driveway.

Appellant submits that Judge Faust could readily see the unmeritorious claim regarding the retaining walls. (Tab W)

Andrea Pullos testified that these imaginary retaining walls would need to be thirty (30) feet high,[146] footings a third of the height of the walls,[147] there would need to be three of them,[148] and the costs would be between five hundred thousand dollars ($500,000.00) and one million dollars ($1,000,000.00).[149]

Appellant submits that a review of the transcript for these three or four pages, highlights what not looking at the turnaround meant in this action as this testimony by Andrea Pullos is totally made up out of the sky.[150] (Tab W)

Appellant submits that this is just another glaring example how Salt Lake County would make up outrageous claims, without having even looked at the area and then shift the burden to prove otherwise to the Defendant.

Notwithstanding the unmeritorious claim for mega retaining walls, the Honorable Robert Faust made very specific FINDINGS OF FACTS No. 8 and No. 9 quoted above that there was plenty of room to shift the turnaround to the East when he denied the Motion for Immediate Occupancy. (Tab I)

Appellant submits that the ability of Salt Lake County to shift the turnaround to the East to avoid taking any part of Lot #1, Block 9, The Groves Subdivision, was so obvious that even the Deputy County Attorney, Donald Hansen stipulated to it: [151]

Q. (BY MR. WALSH) Okay. Let's go in this direction here. And tell me how far.

A. I'm still a little bit confused on your questioning here, because that's just basically till you hit the toe of slope you're less than 15 –
THE COURT: Maybe I can –
THE WITNESS: -- percent.
THE COURT: Maybe I can speed it up. I think what Mr. Walsh is trying to prove, there's nothing that prohibits you from designing and putting the thing over on that side, all the way over.

Is that right, Mr. Walsh?
MR. WALSH: That's right.
THE COURT: That's the bottom line?
MR. HANSEN: We'll stipulate to that then, Your Honor.

Notwithstanding all the above, Andrea Pullos maintained through the end of the Plaintiff's case that the imaginary retaining walls would be required to move the turnaround to the East,[152] even in the face of the law of the case in the FINDINGS OF FACT #8 AND #9, which she established herself at the hearing on the Motion for Immediate Occupancy. (Tab I)

The Defendant then produced a mountain of evidence showing the Trial Court that the claim regarding retaining walls was disingenuous.

Note for example Defendant's Ex. #175 which includes motion pictures, which shows how the Salt Lake County Fire Truck, as well as many other vehicles, could turnaround perfectly after the modifications were made following the first four days of trial and **before the amended design was created.**

Appellant respectfully submits that this conclusively established no need whatsoever to take any part of Lot #1, Block 9, The Grove Subdivision.

By virtue of the foregoing, Appellant submits that Salt Lake County clearly intended to and had knowledge of the fact that its actions would hinder, delay and defraud the Defendant.

ARGUMENTS FOUR

DEFENDANT SHOULD BE AWARDED ATTORNEYS FEES AND COSTS FOR THE CONDUCT OF SALT LAKE COUNTY

OUTSIDE OF THE LITIGATION

The East side of the turnaround even beyond the platted road known as Burrs Lane belonged to Salt Lake County by prescription.[153]

This area included all of the property that Defendant proposed Salt Lake County use in order to not damage Lot #1 and the accompanying water tanks and water works.[154](Tab Y)

Salt Lake County "as the manager or trustee of public roads" had engaged in a lawsuit before Judge Homer Wilkinson to establish this area as belonging to the public.[155]

Defendant's Exhibit #9 is the Order, Judgment and Decree entered and executed by the Honorable Homer Wilkinson which refers to this area as the "traveled road" which states in paragraph #5:

> "The Court concludes as a matter of law that the traveled road leading up to Roosevelt Trail is a public road, by operation of 27-12-89 Utah Code Annotated, coupled with the fact that Salt Lake County has maintained the same."

This is also confirmed in Defendant's Exhibit #12 at paragraph #14, as well as Defendant's Exhibit #14, at paragraph #6, which states:

> "6. That title to this use and traveled road (Burrs Lane) located below Roosevelt Trail is quieted in the public and is a public road."

This prescriptive road was far wider than the beaten path, as it was as wide as was reasonable and necessary, based upon its historical use as a road.[156]

By virtue of this Court Order by Judge Wilkinson, Salt Lake County owned all of the flat land to the East where the Defendant proposed the turnaround be shifted so as to

not damage Defendant's Lot #1 and its accompanying water tanks and water works. (Tab W)

As perhaps the ultimate act of bad faith, Salt Lake County, right in the middle of this litigation abandoned this property,[157] gave it back to the adjacent property owners, for free[158] and then argued before the Trial Court **repeatedly** that they could not move the proposed turnaround to the East, because Salt Lake County did not own the same.[159]

Appellant submits that this action by Salt Lake County violated every factor of bad faith outlined in Cady above.

Defendant admitted into evidence Ex. 127, showing the Court an alternative to the proposed taking of any part of Lot #1, Block 9, The Groves. (Tab Y)

This proposal to Salt Lake County showed the Trial Court where Salt Lake County had referenced this general area as "flat parking area."[160]

This proposal showed the Trial Court where the turnaround could be placed on flat area, with no retaining walls on the property that already belonged to Salt Lake County and utilized the flat area referred to in FINDINGS OF FACT #8 AND #9 with eight to ten feet of blacktop plus another ten feet from blacktop to foliage. (Tab W and Tab Y)

Appellant submits that every square inch needed to move the proposed turnaround to the East so as to avoid taking any part of Lot #1, Salt Lake County gifted to the neighboring landowners, and thereafter consistently repeated the notion that Salt Lake County has to take part of Lot #1 as there is no property to the East to avoid taking the same.[161]

Appellant submits that what compounds the bad faith is the fact that Andrea Pullos, while making no time to look at the turnaround for purposes the original design[162] and making no time to look at the turnaround for purposes of the amended design,[163] not only went to look at the property Salt Lake County intended to abandon, but she described her actions as follows: "In order to give a fair recommendation, I went up and walked the roadway with Larry Helquist ..."[164]

Appellant submits that in the mockery of "In order to give a fair recommendation.." Andrea Pullos did go look at the turnaround when it was time for her to rationalize her original design for her first deposition,[165] again for her second deposition regarding the amended design[166] and also again for purposes of trial.[167]

In sharp contrast, "in order to make a fair recommendation" Tosh Kano went and viewed the area two times,[168] Matthew Roblez went and viewed inside the tanks two times,[169] Blake Karrington viewed the area hundreds and hundreds of times,[170] even Judge Robert Faust went and viewed the area.[171]

In fact, the Court Bailiff, put in more time and attention than Andrea Pullos as he accompanied Judge Faust for the onsite examination.[172]

Appellant submits that in another action, outside of the trial itself, Salt Lake County violated every factor of bad faith outlined in Cady above.

This action, by Salt Lake County was a pretense for the taking itself as Linda Hamilton, Director of Public Works, took the County Council to the turnaround site in order to show them how badly Salt Lake County needed an enlarged turnaround.[173]

This was done so that she could show the Court an alleged good faith taking, as she went to great efforts in the trial itself to tell the Court about her efforts.[174]

At page 36 and 37 of the transcript for May 8, 2008, she stated as follows:

> "We took a snow plow up and we took a sanitation truck up and we – and I had other people with me, I had the mayor up there at one point, I've had County council members there, I've had the administrative assistants to council members there and we would just show them what it was like to try and turn one of those vehicles around in that turn-around. And these were all when there was no snow on the ground."

This bad faith by Salt Lake County however, backfired because Linda Hamilton had to admit on Cross Examination that she ran the tests when there were temporary barricades put up by Thomas Johnson.

On page 56 and 57 of the transcript for May 8, 2008, on cross examination she testified:

> Q. So, the County has never done a test, any kind of demonstration with being able to turn round in this turnaround where that obstruction wasn't there; fair?
> A. I haven't done a test, no.

These posts put in by Thomas Johnson,[175] were the subject of another bad faith action by Salt Lake County.[176]

Long after the ruling by Judge Wilkinson establishing the turnaround on the East side as a public land, Thomas Johnson placed temporary red posts where he claimed the property was his and not public.[177]

Thomas Johnson knew this was not honest as he had participated in the Wilkinson litigation to have this very land declared as belonging to Salt Lake County.[178]

Don Hansen then wrote a letter demanding that these posts be removed as reflected in Defendant's Exhibit No. 7:

> "This office represents the interests of Salt Lake County ("County") in and to the paved, County-maintained area at the intersection of Burrs Lane and Roosevelt Trail (locally known and hereinafter referred to as the "turnaround") in the Pinecrest District of Emigration Canyon. It is the County's understanding and position that the Utah Third District Court quieted title to the entire paved portion of the turnaround, and the entire platted, as well as the used and traveled, portions of Burrs Lane below Roosevelt Trail, in the County as a public road in 1992. The County has maintained that position continuously since that time.
>
> This office was recently informed that within the past two to three weeks, you erected or caused to be erected, a steel chain-link fence across a portion of heaved turnaround, and in so doing, you caused damage to the asphalt pavement by digging eleven holes for placement of steel fenceposts. It is our further understanding that the fence was in place for less than one week, has been removed, and that the holes dug in the asphalt have been temporarily filled with concrete. The Court regards such actions as tress and destruction of County property. Accordingly, you are hereby instructed to immediately cease and desist the placement of any fence or other encroachment upon the County's property at the turnaround. In the event of any future placement by you, or at your behest, of fences or other objects constituting a trespass upon a County road dedicated to public use will result in both removal of such objects(s) by the Court and legal action against you...."

The bad faith comes into play when Salt Lake County abandons its claims that Judge Wilkinson established this area as belonging to Salt Lake County, in order to justify taking the Defendant's property on Lot #1, Block 9, The Groves Subdivision.

It is just another action of bad faith by Salt Lake County, as shown in Defendant's Exhibit 35, Salt Lake County Commissioner Brent Overson suggested to Thomas Johnson to in fact put up the said fence.

These posts were the subject of two separate lawsuits filed in the Third District Court,[179] each assigned to Judge Quinn wherein the Defendant attempted to get the Court to establish the subject land as belonging to Salt Lake County.

Appellant has never been able to understand why Salt Lake County as "manager or trustee of public roads"[180] would oppose a lawsuit establishing the subject land as belonging to Salt Lake County, other than pure bad faith.

Appellant submits that there are two obvious examples of the bad faith of Salt Lake County reflected in the different positions taken by Salt Lake County in the first four days of trial and the last two days of trial.

(1) In the last two days of trial Salt Lake County made no attempt to take all of the Defendant's property to toe of slope. Salt Lake County acknowledged there was no need.[181]

(2) In the last two days of trial Salt Lake County made no attempt to suggest that Salt Lake County needed Defendant's property for snow storage. This Finding of Fact[182] established the bad faith claim and so Salt Lake County conceded there was no need.[183]

The biggest difference between the first four days of trial and the last two was Andrea Pullos finally getting the words down, "the least private injury with the greatest public good ."

Andrea Pullos admitted the same when she testified that no one had complained or made any kind of claim that the modified turnaround built by Salt Lake County between day four and day five of trial, some two and half years, was not working perfectly.[184]

Pullos outright admitted that she talked with her attorney, Donald Hansen and that formed the basis for the new design:

> A. I took the information I had gained from the trial and the suggestion – and discussion with my attorney about the – hopefully I'll get this right – the most public good with the least private impact. …"

Appellant submits that Andrea Pullos openly admits that the new design was not based on new evidence or new studies, etc.

Appellant therefore submits that it should have its Attorneys Fees and Costs compensated as there is no dispute that Salt Lake County attempted to take the only lot of BCW that had year round access, electricity, gas, telephone, water, sanitation, fire protection and a culvert where the stream is protected and therefore the Defendant has unique development opportunities as the same would have less affect on the stream.[185]

Additionally it is undisputed that Salt Lake County attempted to take a mere 0.003 acre which tied up the water tanks and the water works for all of the other 400 plus residential lots of Defendant for almost four years and thereby permanently damaged the Defendant.

ARGUMENT FIVE

DEFENDANT SHOULD BE AWARDED ITS ATTORNEYS FEES AND COSTS AS SALT LAKE COUNTY HAS A HISTORY OF ABUSE IN REFERENCE TO THE EXERCISE OF ITS POWER OF EMINENT DOMAIN

On the third day of trial, Lonnie Johnson, Administrative Assistant to Councilman at Large, Randy Horiuchi, testified that he had attended various meetings involving condemnation actions against the Defendant.[186]

In reference to the condemnation actions involving the Defendant's property Lonnie Johnson testified how Salt Lake County had taken actions without communicating at all with Defendant and this occurred as many as six times.[187]

He testified how Salt Lake County would not even notify the Defendant of the hearings involving the Defendant's own property and this occurred as many as five times.[188]

He testified how Salt Lake County had meetings where Defendant was not allowed to speak and this happened as many as four times.[189]

At page 236 Lonnie Johnson testified on Examination by Mr. Hansen as follows:

> Q. You also stead – stated in your deposition testimony that you believed that the condemnation action was unfair because it was part of harassment against Walsh by the County over 12 to 15 years.
> A. Actually over, over a longer period than that.

Appellant submits that this uncontroverted testimony is most significant as this witness was identified by Salt Lake County as one of their witnesses for their case in chief.[190]

This is an insider commenting on actions taken by Salt Lake County not only about this bad faith action but the bad faith of Salt Lake County for longer than fifteen years.

Lonnie Johnson is part of the Administration of Salt Lake County as he is the Administrative Assistant to Councilman Randy Horiuchi.[191]

This testimony was consistent with several of Defendant's Exhibits that were admitted into evidence that showed the bad faith eminent domain actions of Salt Lake County.

Note Defendant's Ex. #17, wherein Salt Lake County, while using its eminent domain power attempted to create a parking lot for twelve parking spaces, on the exact same lot they were trying to condemn in the action herein. Note that Salt Lake County intended to culvert the stream right in front of the Defendant's residence. (Tab M)

Note Defendant's Ex. #19, wherein Salt Lake County, while using its eminent domain power attempted to condemn Lots #25, #26, #27 and #28, in Block 8, The Groves Subdivision immediately north of Defendant's residence. (Tab N)

Note Defendant's Ex. #24, wherein Salt Lake County, again attempted to create a parking lot right in front of the Defendant's residence. (Tab O)

Defendant was spared from these abusive actions by Divine Intervention as both the State and Federal Government would not allow the stream to be culverted as reflected in Defendant's Ex. #18 and #23.

Perhaps the greatest abuse by Salt Lake County, which is inverse condemnation at its extreme, is reflected in Defendant's Ex. #32, wherein Salt Lake County passed a formal Resolution No. 2113, prohibiting the County Road from being more than 13 (thirteen) feet wide, plus one foot shoulders on each side for a total width of 15 feet wide, leading up to the Defendant's 480 lots. (Tab P)

The whole resolution bears repeating all of its terms here, but in the interests of space Appellant submits that it is surreal as it makes it a crime to make this road wide enough for a fire truck, etc.

Lonnie Johnson testified that he was the Public Works Director at the time and he and Fire Chief Berry were instructed by the Salt Lake County Commission, under the Direction of Commissioner Jim Bradley, not to comment at the Public Hearing regarding this flagrant violation of the Defendant's rights.[192]

Appellant submits that these many actions by Salt Lake County and the specific intent in the subject lawsuit as testified to by Lonnie Johnson clearly show why Judge Robert Faust made a Conclusion of Law that Salt Lake County had not acted in good faith.

Appellant submits that none of the foregoing evidence, in Argument Five was challenged at trial in any way by Salt Lake County as the County Attorney could not as it is too surreal.[193]

Appellant submits that the testimony of Lonnie Johnson, which was undisputed, clearly establishes the subjective intent of Salt Lake County to harm the Defendant as there can be no question about the actions of Salt Lake County, in reference to:

> (1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay or defraud others.

Salt Lake County acted with pinpoint accuracy when going after a mere 0.003 acre which tied up the Defendant's water tanks, water works and hundreds of Defendant's residential lots for almost four years and thereby permanently harmED the Defendant.

ARGUMENT SIX

THE ACTIONS OF SALT LAKE COUNTY VIOLATED THE UNITED STATES CONSTITUTION

The Fifth Amendment to the United States Constitution provides:

"No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

"… No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant is not seeking any kind of reward or any kind of windfall by virtue of the actions of Salt Lake County.

Appellant is merely seeking to be made whole for the Attorneys Fees and Costs it had to expend to defend against the actions of Salt Lake County. Appellant is merely seeking to be put back where it was before Salt Lake County brought its unmeritorious action.

Appellant, Butler Crockett and Walsh Development Corporation did nothing wrong, that brought about this action.

This is not a case where BCW had committed a crime of any kind for which the law requires the Defendant to answer.

Nor is this a case where the Defendant breached some standard of care which proximately caused injury to another.

All that can be said of the Defendant's actions is that it held title to the property which Salt Lake County set out to take.

Hence, Defendant is charged with "merely holding title to land."

The act of owning land and owning title is a fundamental God given right and one secured by the United States Constitution.[194]

Here Salt Lake County took control of the land and the water tanks and the water works and tied the Defendant's hands from developing its 480 residential lots for almost four (4) years.

The critical four years when real estate was booming and where the Defendant could have developed, marketed and sold potentially hundreds of its residential lots, had its water tanks and water works not been the subject of condemnation action.

Judge Faust recognized the great damages the Defendant was sustaining when he described the same as "astronomical" in FINDING OF FACT NO. 19:

> "19. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the greatest public good, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the potential costs in relocating the water tanks, other land that would be needed to relocate the tanks, and whether the whole water system would be affected and how the loss of water system could affect the development of unnumbered lots and hence the expense of putting the turnaround over the water tanks could be astronomical."

Appellant submits that the loss is not measured by what the property was actually being put to at the time of the taking rather Appellant submits that the loss is measured by the highest and best use to which Defendant could put its property.

In the age old case of Moyle vs. Salt Lake City, 176 P.2d 882 (Utah 1947) the Utah Supreme Court with facts strikingly similar to this case, stated this principle perfectly:

"It is elemental in eminent domain cases, that the owner is entitled to the value of the property for the highest and best use to which it could be put at the time of the taking, and is not limited to the use then actually made of it."

Here Salt Lake County took away the "use" when the "highest and best use" was "astronomically" more valuable than when it was returned to the Defendant.

The actions of Salt Lake County were intentional and in bad faith.

The resolution passed by Salt Lake County as conclusively established in Defendant's Ex. 32, to limit the road to a mere 13 feet coupled with making it a crime to make it wide enough to comply with Salt Lake County's own fire code is rank bad faith.

This put all 480 residential lots of the Defendant is a catch 22 when it came to developing and getting building permits.

This drastically reduced the value of all 480 residential lots as access is critical to any potential purchaser and no bank will finance a residential lot that does not have meaningful access, with no fire protection, etc.

The original effort to take all of the Defendant's flat area in Lot #1, Block 9, The Groves Subdivision is rank bad faith. This is confirmed in the amended design as Salt Lake County thereby admitted that it did not "need all the flat area" in the first place.[195]

Taking all of the flat area prohibited the Defendant from putting a home on Lot #1 and Lot #2 out right.[196]

This one lot not only had the water tanks and water works already in place it was the only lot of all 480 that had "electrical, gas, telephone and water already in place for development, etc."[197]

The pinpoint attempted taking of 0.003 acre was no accident as Salt Lake County acknowledged the existence of the water tanks and the water works from the beginning in the Complaint for Condemnation.

Here Salt Lake County acknowledged that no studies, no investigations, not witness, etc., that suggested that Salt Lake County needed any part of Lot #1, Block 9, The Groves. Appellant is merely requesting to be made whole by way of "just compensation" for the attorneys fees and costs it had to expend to defend the unmeritorious and bad faith action of Salt Lake County.

ARGUMENT SEVEN

THE ACTIONS OF SALT LAKE COUNTY VIOLATED

THE UTAH STATE CONSTITUTION

Section 22 of the Utah State Constitution provides:

"Private property shall not be taken or damaged for public use without just compensation."

Here the claim is much different than is the claim under the United States Constitution as the Utah State Constitution prohibits the mere damaging of private property without just compensation.

Here the loss sustained by the Defendant is based on "damaged goods" as the 480 residential lots were "astronomically damaged" in the before and after state.

In reality Salt Lake County continues to damage the Defendant's property as the Resolution to limit the access to Defendant's property is still restricted to a 13 foot wide road and it is still a crime to attempt to widen it. (Tab P also Tab T, U and V – too narrow for plows)

Additionally, no purchaser could ever qualify with a lending institution once the lack of ingress and egress was discovered

In the case of Moyle vs. Salt Lake City, 176 P.2d 882 (Utah 1947) which is very similar to this matter, the Utah Supreme Court referred to a measure of damages as follows:

> "That the reasonable rental value of property, the possession, use and control of which has been withheld from the owner or lawful possessor is a proper measure of damage for such withholding, in the absence of claims of special damage, is too elemental to require citation of authority."
>
> Here there are special damages in the costs and attorneys fee incurred by the Appellant.

Appellant submits that Salt Lake County has taken the heart of Defendant's project and has prevented the Defendant from doing any kind of development with the same for almost four full years.

It is the four years in history when the real estate market was at an all time high and fell to an all time low.

Appellant submits that this constitutes a classic taking that is prohibited by both the United States Constitution and the Utah State Constitution.

The Utah Court of Appeals addressed the taking issue in reference to a regulatory taking in the case Arnell vs. Salt Lake County, 112 P.3d 1214 (Utah App. 2005) beginning at page 1220:

> ¶ 16 The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, *see Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979 (1897), states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. "The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use." *Palazzolo v. Rhode Island,* 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). "[T]he United States Supreme Court has recognized two other categories of takings: regulatory takings and development exactions." *Diamond B-Y Ranches,* 2004 UT App 135 at ¶ 14, 91 P.3d 841. This case involves a regulatory taking.
>
> ¶ 17 The United States Supreme Court first recognized regulatory takings in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). In Justice Holmes's now famous words, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415, 43 S.Ct. 158. A regulation that " 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Palazzolo,* 533 U.S. at 617, 121 S.Ct. 2448 (quoting *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)). This is a so-called total taking. Even if a regulation falls short of eliminating all economically beneficial use of land, an analysis of a complex of factors indicates whether the interference is so great that a virtual taking has nonetheless occurred. *See id.* The factors include "[t]he

> economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations
>
> ... [and] the character of the governmental action." *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). "These inquires are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Palazzolo,* 533 U.S. at 617-618, 121 S.Ct. 2448 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

Appellant respectfully requests that this Court "prevent the government from 'forcing some people alone (Defendant) to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" "particularly, in light to which the regulation has interfered with the distinct investment-backed expectations ... coupled with the character of the governmental action.

Appellant submits that the preventing of meaningful access coupled with tying up the water tanks, water works and hundreds of Defendant's lots has permanently damaged the Defendant and the overwhelming expense in attorneys fees and costs all in violation of the Defendant's Utah State Constitutional right prohibiting the same.

ARGUMENT EIGHT

ATTORNEYS FEES ON APPEAL

Appellant claims that it should have been awarded Attorneys Fees at the Trial Court level and consistent with Softsolutions, Inc. vs. Brigham Young University, 1 P.3d 1095 (Utah, 2000) should be awarded Attorneys Fees on Appeal.

In the case of Valcarce vs. Fitzgerald, 961 P.2d 305 (Utah, 1998), at page 319, the Utah Supreme spelled out when Attorneys Fees are recoverable on appeal:

> As a final matter, we address the Fitzgerald parties' claim that they are entitled to the attorney fees they incurred on appeal. We stated in *Salmon v. Davis County,* 916 P.2d 890, 895 (Utah 1996), "This court has interpreted attorney fee statutes broadly so as to award attorney fees on appeal where a statute initially authorizes them." In addition, when a party who received attorney fees below prevails on appeal, "the party is also entitled to fees reasonably incurred on appeal." *Utah Dep't of Social Servs. v. Adams,* 806 P.2d 1193, 1197 (Utah Ct.App.1991).

Appellant submits that when the dust has all settled, Salt Lake County is not out a dime as they have not lost a thing.[198] They undeniably have tied up the Defendant's property and the Defendant has had to gather a mountain of evidence to beat the presumption that Governmental entities have in the exercise of their powers of eminent domain.

As noted above, it is very rare that the Trial Court Judge will substitute his judgment for that of the Salt Lake County Council.[199]

Yet here the Court has held that Salt Lake County cannot use their power of eminent domain and the Trial Judge listed seven reasons why and all of these are independent of the Findings and Conclusions, as the final ruling is based upon the amended design.

In reality they did not have to pay for any expert witness.[200] They paid Jerry Webber at witness fee after the Defendant paid him thousands of dollars.[201]

The other experts used by the Salt Lake County were mere employees who were engaged to discredit the Defendant's witnesses.[202] So Salt Lake County essentially had no costs and the Defendant had over $13,000.00 in costs.

Salt Lake County put on no witness in support of need, no study in support of need and frankly not even a scintilla of evidence in support of any purported need.

Hence, this whole trial was needless.

By virtue of the foregoing, Appellant respectfully requests that it be awarded all of its costs and attorneys fees on appeal pursuant to the Utah State Constitution.

CONCLUSION

Appellant submits that it is most significant that it was Andrea Pullos herself, the Traffic Engineer from Salt Lake County, who provided the Court with the evidence that defeated the Motion for Immediate Occupancy. (Tab I)

Similarly, it was Andrea Pullos' notes, obtained by the Defendant through discovery that provided the Court with the evidence that caused the Court to dismiss Salt Lake County's Complaint with prejudice. (Tab X and Tab Z)

It has been Lonnie Johnson, Administrative Assistant to Randy Horiuchi, Salt Lake County Councilman at Large, who supplied the Court with the evidence that this action was asserted subjectively in bad faith.[203]

It was Toshiharu Kano, prior Salt Lake County Division Director in charge of Public Works Operations for Salt Lake County who testified that the proposed amended design was far more dangerous than the turnaround that already existed on the ground when he went and observed the sight distance problems.[204]

It was the Salt Lake County Fire Department that showed the Court in the Blake Karrington's pictures that the Fire Department could turnaround just fine with the as built prior to day five and day six of trial.[205]

Appellant submits that it was Salt Lake County employees, past and present that has established that this action was without merit and brought and maintained in bad faith.[206]

Appellant submits that it was Salt Lake County documents, extracted from Salt Lake County through discovery that established that this action was without merit and brought and maintained in bad faith.[207]

At the end of the first four days of trial, the Honorable Robert Faust, wrote in his Minute Entry at page 480B of the Record:

> "After weighing the testimony and evidence that was presented at the hearing, the Court finds that the County designed the proposed turnaround without adequately considering the impact on the adjoining land, the water systems currently in place, the burden of additional snow storage on the Defendant's property, and the parking situation and its resulting impact on further development."

At the end of the fifth and sixth days of trial, the Honorable Robert Faust, wrote in his Minute Entry at page 1360 of the Record: (Note Salt Lake County withdrew its claim of need for snow storage.)[208]

> "After weighing the testimony and evidence that was presented at the hearing, the Court finds that the County's amended design of the proposed turnaround is not the most compatible with the greatest public good and the least private injury and was done without adequately considering the impact on the adjoining lands, use of adjoining lands to effectuate a turnaround, the water system currently in place, and the parking situation and its impact on future development."

Appellant submits that there should be no wonder why the Trial Court ruled the same as there was no difference in the "testimony and evidence" as Andrea Pullos merely memorized the words, "greatest public good and the least private injury" and other than this, there was nothing different submitted to the Court.

Appellant submits that when actions are meritorious and brought in good faith it is the tax payer who flips the bill.

In a large measure it is the tax payer paying the costs and attorneys fees to have his own property taken.

Nichols on Eminent Domain recognized this principle at G15.01, wherein it states:

> In a trial against the condemnee, the condemning authority will pay for top notch lawyers and well-qualified surveyors, engineers, land planners, and real estate appraisers. The condemnor will employ extensive discovery and costly sales researches, photographs, videos, charts, and other demonstrative evidence. To be on an equal footing with the government in our adversary system of jurisprudence, and to utilize the constitutional provision of due process of law, the condemnee should also employ experienced lawyers and experts, such as surveyors, engineers, land use planners and real estate appraisers. The condemnee will need to employ experts whose qualifications can match the government's counterparts, and to use the same tools of persuasion as the government in its testimony and evidence. Because it is the taxpayer who pays the costs and fees of the condemnor's trial effort, the condemnee, ironically, pays to have the government oppose his or her clam as an individual owner. It would not seem unjust, then, to have the same tax revenues pay for the condemnee's legitimate defense in condemnation cases.

Appellant submits that Nichols is suggesting that when the actions are legitimate then the Condemnee should have his costs and attorneys fees paid, hence all the more so when the action is without merit and not brought or asserted in good faith.

RELIEF SOUGHT

Appellant respectfully requests that this Court reverse the determination made at the trial level to deny fees and to limit costs and remand the same to the District Court to award attorneys fees for all efforts made at the Trial Court level as well as all the efforts on Appeal and to award every conceivable cost both at the Trial Court level as well as on Appeal.

Dated this 29th day of March, 2012.

JOHN WALSH
ATTORNEY FOR APPELLANT

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered two true and correct copies of the APPELLANT'S BRIEF, to the Plaintiff by hand delivering the same to DONALD H. HANSEN, DEPUTY DISTRICT ATTORNEY, 2001 SOUTH STATE STREET, SUITE #S3700, SALT LAKE CITY, UTAH, 84190.

Dated this 29th day of March, 2012.

JOHN WALSH
ATTORNEY FOR APPELLANT

ADDENDUM

A. End Notes

B. Notice of Appeal

C. Order, Judgment and Decree

D. Memorandum Decision re: Fees and Costs

E. Affidavit on Costs

F. Memorandum Decision re: Ruling on Condemnation Complaint

G. Plaintiff's Motion for Voluntary Dismissal with Prejudice

H. Order Denying Motion for Immediate Occupancy

I. Findings of Fact and Conclusions of Law

J. Minute Entry – Denial of Motion for Immediate Occupancy

K. Defendant's #4 – Fire Code

L. Defendant's #7 – Letter by Donald H. Hansen re: Turnaround

M. Defendant's #17 – Parking Lot – 12 Stalls

N. Defendant's #19 – Condemn parts of Lots #25, #26, #27 and #28, Block 8, The Groves

O. Defendant's #24 – Five Parking Stalls

P. Defendant's #32 – Resolution No. 2113 – Limit road to 13 feet plus 1 foot shoulders

Q. Defendant's #35 – Salt Lake County Commissioner Brent Overson re: Fence off

R. Defendant's #38 -- Schematic of Water Tanks

S. Defendant's #41 – Topographical Map on location of Water Tanks

T. Defendant's #90 – County Snow Plow not make it up narrow road

U. Defendant's #91 – County Snow Plow not make it up narrow road

V. Defendant's #92 – County Snow Plow not make it up narrow road

W. Defendant's 117 – Picture showing flat area – Plenty of area – No need for retaining walls

X. Defendant's #159 – County Road Map – Basis for Court's ruling

Y. Defendant's #167 – This is Ex. #127 with xxx for retaining walls

Z. Defendant's #169-E – County Road Map – Basis for Court's ruling

20110856-CA

Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

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_____
Attorney's or Party's Name

Dated: March 28, 2012

Tab A

END NOTES –

1. Note Record at pages 1-34
2. Note Record at page11 and also Record at page 68
3. Note Record at page 2
4. Note Record at page 8
5. Note Record at page 7
6. Note Record at page 35 also note Transcript of Sixth day of Trial at page 29.
7. Note Record at page 1354
8. Note Defendant's Exhibit No. 159
9. Note Defendant's Exhibit No. 160 – Transcript May 8, 2008
10. Note Defendant's Exhibit No. 161- Transcript May 9, 2008
11. Note Defendant's Exhibit No. 162 – Transcript June 6, 2008
12. Note Defendant's Exhibit No. 163 – Transcript June 10, 2008
13. Note Record at page 575
14. Note Record at pages 570-571
15. Note Record at pages 595-597 – The written Motion requests that the Court dismiss with prejudice, however, the Motion was changed in Open Court to a Motion to Dismiss without prejudice.
16. Note Record at page 659
17. Note Record at page 665 and following
18. Note Record at page 803
19. Note Defendant's Exhibit No. 159
20. Note Record at pages 1349-1350
21. Note Record at page 1351
22. Note Record at page 1360
23. Note Record at page 1363 and following
24. Note Record at page 1475
25. Note Record at page 1490
26. Note Defendant's Exhibit #161 – Transcript May 9, 2008 at page 113
27. Note Defendant's Exhibit #163 – Transcript June 10, 2008 at page 55
28. Note Record at page 560
29. Note Record at page 570
30. 78-34-5 Utah Code Annotated has been revised to 78B-6-504 Utah Code Annotated
31. Note Record at page 7
32. Note Record at page 570-571
33. Note Record at page 560 and following
34. Note Transcript of June 10, 2008 at page 232
35. Note Transcript of May 9, 2008 at page 234
36. Note Record at page 560 and following
37. Note Record at page 570 and following
38. John Adams, Defence of Constitutions of Government of United States, Chapter 16.
39. Note Record at page 11.
40. Note Defendant's Exhibit No. 41
41. Note Defendant's Exhibit No. 159
42. Note Record at page 11

43. Note Record at page 803
44. Note Defendant's Ex. 163 – Transcript of June 10, 2008 at page 16. Also Note FINDING OF FACT NO. 4, at page 561 and page 562 of the Record and FINDING OF FACT NO. 17, at page 566 of the Record.
45. Note page 14 of the Record.
46.78-34-16 Utah Code Annotated has been revised to 78B-6-517 Utah Code Annotated.
47. Note Record at page 233
48. Note Record at page 131
49. Note Record at page 266.
50. Note Record at page 655
51. Note Record at page 660
52. Note Record at page 672
53. Note Record at page 738
54. Note Record at page 738 -758
55. Note Record at page 1502 and 1503
56. Note Defendant's Exhibit #41 as Tab S in the Addendum
57. Note Defendant's Exhibit #159 as Tab Z in the Addendum also Finding #11.
58. Note Transcript of February 16, 2011 at page 92 and following
59. Note Transcript of February 16, 2011 at page 88
60. Note Transcript of February 16, 2011 at page 88 and following
61. Note Transcript of February 16, 2011 at page 91
62. Note Transcript of February 16, 2011 at page 91
63. Note Transcript of February 16, 2011 at page 95
64. Note Transcript of February 16, 2011 beginning at page 112
65. Note Transcript of February 16, 2011 beginning at page 88
66. Note Testimony of Andrea Pullos on February 16, 2011 from page 82 – 123
67. Note Record at page 954
68. Note Record at page 1354
69. Note Defendant's Exhibit #159 and #169-E – Tab Z in Addendum
70. Note Defendant's Exhibit #4 – Tab K in Addendum
71. Compare Ruling Denying Motion for Immediate Occupancy Tab J with Ruling Dismissing the Action Tab F in addendum.
72. Note Record at page 1302
73. Note Record at page 615
74. Note Tab G in addendum
75. Note Record at pages 1502 and 1503
76. Note Tab I in the addendum
77. Note Tab F in the addendum
78. Note Tab H and I in the addendum
79. Note Record at pages 1502 and 1503
80. Note Transcript of February 16, 2011 at page 4
81. Note Transcript of February 16, 2011 at page 84
82. Note Transcript of February 16, 2011 at page 92
83. Note Transcript of February 16, 2011 at page 82 and following
84. Note Transcript of February 16, 2011 at pages 87 and 88
85. Note Transcript of February 16, 2011 at page 4

86. Note Transcript of February 16, 2011 at page 74
87. Note Defendant's Exhibit #169
88. Note Transcript of June 6, 2008 at page 245
89. Note Transcript of June 6, 2008 beginning at page 110
90. Note Defendant's Exhibit #169.
91. Note Defendant's Exhibit #169.
92. Compare Testimony of Barrett at page 125 with Ellis at page 144 and following
93. Note Transcript of June 6, 2008 at page 125
94. Note Transcript of February 16, 2011 at page 139
95. Note Transcript of February 16, 2011 at page 144
96. Note Transcript of February 16, 2011 at page 151
97. Note Defendant's Exhibit No. 1, at page 42
98. Note Defendant's Exhibit No. 1, at page 66 and page 67
99. Note Transcript of May 9, 2008 at page 244
100. Note Tab K.
101. Note Tab X
102. Note Tab Z
103. Compare Tab K with Tab Z
104. Compare Tab K with Tab X
105. Note Tab X
106. Note Tab Z
107. Note Defendant's Exhibit No. 1, at page 42 and page 66
108. Note Transcript of June 6, 2008 at page 53
109. Note Defendant's Exhibit No. 1, at page 66
110. Note Defendant's Exhibit 4, Tab K
111. Note Transcript of May 9, 2008 at page194 and Transcript of May 8, 2008 at page 86
112. Note Transcript of June 6, 2008 at page 53
113. Note Transcript of May 9, 2008 at page 244
114. Note Transcript of February 16, 2011 at page 95
115. Note Tab I
116. Note Tab X
117. Note Record at page 17
118. Note Record at page 29
119. Note Record at page 1335
120. Note Record at page 1335
121. Note Transcript of February 16, 2011 at page 4
122. Note Transcript of February 16, 2011 at page 67
123. Note Transcript of February 16, 2011 at page 32
124. Note Transcript of February 15, 2011 at page 48
125. Note Transcript of February 16, 2011 at page 68
126. Note Transcript of February 16, 2011 at page 68
127. Note Record at page 1335
128. Note Transcript of February 16, 2011 at page 60
129. Note Transcript of May 8, 2008 at page 6
130. Note Record at page 954 and following
131. Note Record at page 848 and following

132. Note record at page 1074
133. Note record at page 1196
134. Note record at page 1302
135. Note record at page 1354 also Tab F
136. Note record at page 560
137. Note Tab I
138. Note Tab F
139. Note Tab I, Tab X and Tab Z
140. Note Tab I
141. Note Transcript of May 9, 2008 at page 247
142. Note Transcript of June 6, 2008 at page 63
143. Note Transcript of June 6, 2008 at page 42
144. Note Transcript of February 16, 2011 at page 95
145. Note Defendant's Exhibit #167 – Tab Y – Note xxx to the East
146. Note Transcript of June 6, 2008 at page 247
147. Note Transcript of June 6, 2008 at page 249
148. Note Transcript of June 6, 2008 at page 247
149. Note Transcript of June 6, 2008 at page 249
150. Note Transcript of May 9, 2008 at page 268
151. Note Transcript of June 6, 2008 at page 61
152. Note Defendant's Exhibit #167 – Tab Y – Note xxx to the East
153. Note Defendant's Exhibit #9, #12 and #14
154. Note Defendant's Exhibit 169E
155. Note Defendant's Exhibit #9, #12 and #14.
156. Note Defendant's Exhibit 169E
157. Note Transcript of May 8, 2008 at page 67
158. Note Transcript of May 8, 2008 at page 68
159. Note Transcript of February 17, 2011 at page 74
160. Note Defendant's Exhibit #169E – Tab Z
161. Note Transcript of February 16, 2011 at page 115
162. Note Transcript of June 6, 2008, at page 42
163. Note Transcript of February 16, 2011 at page 95
164. Note Transcript of May 9, 2008 at page 251
165. Note Transcript of February 16, 2011 at page 95
166. Note Transcript of February 16, 2011 at page 95
167. Note Record at page 1198 and following
168. Note Transcript of February 17, 2011 at page 53
169. Note Transcript of February 17, 2011 at page 6
170. Note Transcript of February 16, 2011 at page 182
171. Note Transcript of May 9, 2008 at page 113
172. Note Transcript of May 9, 2008 at page 113
173. Note Transcript of May 8, 2008 at page 36
174. Note Transcript of May 8, 2008 at page 36
175. Note Transcript of May 8, 2008 at page 56
176. Note Tab L
177. Note Defendant's Exhibit #95

178. Note Defendant's Exhibits #9, #12 and #14
179. Note Transcript of June 6, 2008 at page 292
180. Note Defendant's Exhibit 12
181. Note Transcript of February 16, 2011 at page 96
182. Note Tab I
183. Note Transcript of February 16, 2011 at page 100
184. Note Transcript of February 16, 2011 at page 88
185. Note Tab I
186. Note Transcript of June 6, 2008 at page 236
187. Note Transcript of June 6, 2008 at page 217
188. Note Transcript of June 6, 2008 at page 217
189. Note Transcript of June 6, 2008 at page 218
190. Note Record at page 270
191. Note Transcript of June 6, 2008 at page 173
192. Note Transcript of June 6, 2008 at page 180
193. Note Transcript of June 6, 2008 at page 243
194. Fourteenth Amendment, United States Constitution
195. Note Tab X
196. Note Tab I
197. Note Tab I
198. Note Tab F
199. Note Tab I
200. Note Record at page 270
201. Note Transcript of February 16, 2011 at page 68
202. Note Transcript of February 16, 2011 at page 143
203. Note Transcript of June 6, 2008 at page 236
204. Note Transcript of February 17, 2011 at page 58
205. Note Defendant's Exhibit #174
206. Note Tab I
207. Note Tab X and Tab Z
208. Note Transcript of February 16, 2011 at page 96

Tab B

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ATTORNEY FOR DEFENDANT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

----------oooooooOoooooooo----------

SALT LAKE COUNTY, a body Corporate and politic of the State Of Utah,	;	**NOTICE OF APPEAL**
Plaintiff,	;	
Vs.	;	Civil No. 070913769
BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, A Utah Corporation,	;	Judge Faust
Defendant,	;	

----------oooooooo0oooooooo----------

Comes now the Defendant, Butler, Crockett and Walsh Development Corporation, a Utah Corporation and appeals the Findings, Conclusions, Judgment, Order and Decree of August 16, 2011 denying the award of attorneys fees and limiting the award of costs by the Honorable Robert Faust, Third Judicial District Court Judge to the Utah Supreme Court.

Dated this 12th day of September, 2011.

JOHN WALSH
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the Plaintiff by mailing the same to DONALD HANSEN, DEPUTY COUNTY ATTORNEY, 2001 SOUTH STATE STREET, SUITE S3700, SALT LAKE CITY, UTAH, 84190.

Dated this 12th day of September, 2011.

JOHN WALSH
ATTORNEY AT LAW

Tab C

JOHN WALSH
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ATTORNEY FOR DEFENDANT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

----------oooooooOoooooooo----------

SALT LAKE COUNTY, a body Corporate and politic of the State Of Utah,	;	**ORDER, JUDGMENT AND DECREE**
Plaintiff,	;	
Vs.	;	Civil No. 070913769
BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, A Utah Corporation,	;	Judge Faust
Defendant,	;	

----------oooooooo0oooooooo----------

The above entitled matter came on regularly for an Evidentiary Hearing on the Plaintiff, Salt Lake County's Motion for Immediate Occupancy, before the Honorable Robert Faust, District Court Judge, on May 8TH, May 9TH, June 6TH and June 10TH, 2008 and then again on all remaining issues on February 16th and February 17th, 2011, each time with the Plaintiff, Salt Lake County appearing by and through Donald H. Hansen and David H. T. Wayment, Deputy

District Attorneys and the Defendant, Butler, Crockett and Walsh Development Corporation, appearing by and through John Walsh, Attorney at Law and the Court after making a site visit to the subject property on May 8TH, 2008, and hearing the testimony of the various witnesses and considering all of the exhibits and evidence adduced, and after entering its FINDINGS OF FACT and CONCLUSONS OF LAW and ruling on all Post Trial Motions, now for good cause appearing does hereby,

ORDER, ADJUDGE and DECREE as follows:

1. The Plaintiff's Complaint, Amended Complaint and all claims arising there from are hereby denied and dismissed on the merits and with prejudice.

2. Defendant is hereby awarded judgment for costs in the sum of $1,199.33.

3. Each side shall bear their own attorneys fees.

4. All other issues are hereby resolved and therefore this is the Final Order and Judgment in this matter.

Dated this 15 day of August, 2011.

BY THE COURT:

DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the **ORDER, JUDMENT AND DECREE**, to the Plaintiff by mailing the same in the United States Mails, postage fully prepaid, addressed to Donald H. Hansen, Deputy District Attorney, 2001 South State Street, Suite #S3700, Salt Lake City, Utah, 84190.

Dated this 10th day of August, 2011.

JOHN WALSH
ATTORNEY AT LAW

Tab D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY, a body corporate and politic of the State of Utah,	:	MEMORANDUM DECISION
	:	CASE NO. 070913769
Plaintiff,	:	
vs.	:	
BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, a Utah Corporation,	:	
	:	
Defendant.		

This matter is before the Court on Defendant's Motion to Alter or Amend Judgment.

I.

The matter before the Court arises from an eminent domain action which trial was held on February 16 and 17, 2011. On March 16, 2011, the Court entered its decision denying the County's Petition as the final Judgment in the case; however, the decision did not address an award of attorney's fees or costs.

On March 24, 2011, Defendant filed its first Motion to Alter or Amend Judgment, seeeking an award of fees in this case. On May 25, 2011, this Court issued a Ruling denying Defendant's Motion. Specifically, this Court held that Defendant's Motion failed to satisfy the requirements set forth in Section 78B-5-825 of the Utah Code. Section 78B-5-825 requires a finding that the action was meritless and that the

Plaintiff acted in bad faith in bringing the action in order for attorney's fees to be awarded. This Court found that Plaintiff's actions in regards to the Petition did not rise to the level of "bad faith."

Now, the Court considers a second Motion from Defendant to Alter or Amend Judgment, which requests the awarding of attorney's fees and costs. This Motion consists of (a) an accompanying exhibit that provides information of what "costs" are now claimed, and (b) an argument that § 78B-5-825 was not the only basis on which Defendant has requested and is entitled to attorney fees, and (c) an argument that Kevin Anderson (an attorney other than the Defendant) had provided assistance during the initial part of this litigation and had a separate billing for his work. The Court addresses these arguments.

II.

Rule 59(d) of the Utah Rules of Civil Procedure dictates that "except when express provision...is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Accordingly, Defendant has provided an Affidavit detailing which costs it seeks to have awarded. Plaintiff counters by arguing that (a) the Defendant failed to file the Motion for costs within the five-day time frame allotted by Utah Rule of Civil Procedure 59(d)(2), and (b) Defendant requests awards for costs that Utah law expressly forbids.

Rule 59(d)(2) requires that the Motion to recover costs must be

filed "within five days after the entry of judgment." Defendant filed their Motion to recover on June 7, 2011. Plaintiff argues that Defendant was required to file within five days of the Judgment entered on March 23, 2011 (which would place the Motion outside the time frame). While Defendant doesn't address the issue, it is inferred that the Defendant argues the time frame was triggered by the more recent decision entered on May 25, 2011 (which, considering mailing time and business days, would place the Motion inside the time frame). While the Plaintiff's arguments have been considered, the Court holds that the Motion is timely.

The Court now addresses which costs claimed in Defendant's exhibit are entitled to awarded. Plaintiff correctly argues that, per Utah law, expert witness fees are not recoverable costs in a civil action. See, John Call Eng'g v. Manti City Corp., 795 P.2d 678, 683 (Utah App. 1990). As a result, the $3,000 spent on appraiser Jerry Webber, the $1,420 spent on engineer Tosh Kano, the $2,400 spent on Blake Karrington and $5,373.12 spent on engineer Matthew Roblez cannot be recovered as costs as the Defendant requests.

Additionally, many of the items listed on Defendant's exhibit are referred to only as "AMT Printing" and "Office Max." It is inferred that these costs relate to printing and copying charges. Giusti v. Sterling Wentworth Corp. recently held that printing and copying are not within the definition of costs. As a result, all costs referred to as "AMT Printing" or "Office Max," as well as those explicitly referred to as

copying or printing costs, are denied.

Defendant also requests compensation for "Courthouse parking" (costs referred to as "Matheson Courthouse" are assumed to be parking fees as well). There is no precedent for awarding costs for parking, and the Court sees no reason to set one now and denies the same.

Considering the above, only a handful of items from the Defendant's requests for costs remain:

- Jury Demand
- Four depositions (three labeled "DepoMax Merit," one labeled "Q&A Reporting Inc")
- A refund related to a deposition ("DepoMax Merit Refund")
- A cost referred to as "Smith's"
- A cost labeled "Salt Lake County Surveyor"
- A cost labeled "Clerk - Audio Tape Copy"
- A cost labeled "Salt Lake County Recorder's Office"
- A cost labeled "Postage"

The first two of these bulleted items could qualify for an award of "costs." The remaining six items are not awarded due to vagueness or lack of case law establishing them as recoverable costs. The minimal nature of their descriptions, combined with the low corresponding cash values, suggests a plethora of interpretations as to what the money was actually spent on, ranging from parking to paperwork, to office supplies, to food. As a result, the Court does not award a recovery of costs to

any item other than the Jury Demand for $75.00 and four depositions in the amount of $1,124.33, resulting in a total of $1,199.33 in costs, which is hereby awarded to Defendant.

III.

Defendant's remaining arguments deal with the recovery of attorney's fees. By the way of background, after the Motion for Immediate Occupancy was denied, the Plaintiff on December 10, 2008 filed a Motion for Voluntary Dismissal with Prejudice. As a result the Court granted attorney fees to Defendant based upon § 78B-6-517. However, because the Plaintiff had not met all of the conditions of dismissal, the Court had to vacate its prior rulings on both the dismissal of the action and the award of attorney fees to Defendant. See Minute Entry dated April 9, 2009.

In Defendant's second motion it alleges that the Court erred in its May 25, 2011 ruling in stating that "Defendant appears to concede that there is no other authority [than § 78B-5-825]" to support an award of attorney's fees. Defendant asserts it stated in both its first Motion to Amend and the current Motion, it relies on several statues and Utah case law specific to eminent domain cases for an award of attorney fees. Defendant specifically points to §§ 78B-6-509 and 78B-6-517 of the Utah Code and the cases of Provo City Corporation v. Cropper and Cornish Town v. Koller to prove its argument that Utah case law is "very liberal" in awarding costs and attorney's fees in condemnation cases.

Defendant's arguments are problematic for several reasons. While Defense points to §§ 78B-6-509 and -517 to argue that Utah law contemplates "a much broader analysis" for awarding costs and fees in eminent domain and condemnation cases, the Defendant never specifies how the current case benefits from this "lower standard." Specifically, § 78B-6-517 and the two Utah cases cited deal with instances where the condemner abandons the proceedings and causes the action to be dismissed with prejudice. While an abandonment of the case may have appeared to happen in this case, such was set aside by the Court. See Minute Entry dated April 9, 2009. In addition, the previous scenario does not accurately describe this case since that date or the trial on merits on Plaintiff's amended Petition.

Defendant also relies on a previous finding of fact made by the Court on October 23, 2008, which stated Salt Lake County had not "acted reasonably or in good faith in this condemnation action." In understanding this finding of fact, it is important to note that this language and conclusion dealt solely with a Motion for Immediate Occupancy, and was not rendered on the merits of the Petition as modified and as tried to the Court. The Court has not and does not find Plaintiff acted in bad faith on the Amended Petition tried to the Court and will not grant attorney fees to Defendant on that basis. Further, it was never the Court's intent in its use of language that Salt Lake County had not "acted reasonably or in good faith in this condemnation action" to

determine bad faith by the Plaintiff to justify and upon which to base an award of attorney fees to Defendant, especially when such was being said in the limited context of the issue of immediate occupancy.

Further, Defendant desires the Court to use the definition of "bad faith," in Cady v. Johnson, in regards to awarding attorney's fees by using a three-pronged test: (1) the party lacked an honest belief in the propriety of the activities in question; (2) the party intended to take unconscionable advantage of others; or (3) the party intended to or acted with the knowledge that the activities in question would hinder or defraud others. 671 P.2d 149 (Utah 1993). Satisfying any one of these three, per Cady, would support a finding of bad faith. The Court does not find any of the three prongs above occurred in this case.

Contrary to Defendant's assertions, Plaintiff's proceeding on an amended Petition does much to undermine a finding of bad faith. Defendant argues that Plaintiff merely "went through the motions" during the litigation after the denial of immediate occupancy, relying predominantly on the conduct of Andrea Pullos and an inferred desire to avoid the attorney's fees that would have been awarded had the Complaint remained unmodified. The evidence does not support a finding that the Plaintiff acted in bad faith, even using the definition proposed by Defendant as set forth in Cady. Plaintiffs modified their Complaint, proceeded with litigation and generally showed that they believed the Motion to be a worthwhile cause.

Additionally, the subsequent litigation undermines Defendant's §§ 78B-6-509 and 78B-6-517 claims to attorney's fees. As the Supreme Court noted in Cornish Town v. Koller, "an actual abandonment and dismissal must first occur." While an abandonment and dismissal initially did occur, it was (as aforementioned) withdrawn and the Petition was amended.

IV.

Finally, Defendant seeks an award of attorney's fees on the basis of hiring attorney Kevin Anderson, presumably in an effort to circumvent the suggestion in this Court's May 25, 2011 ruling that "pro se litigants, even those who are also attorneys, are not entitled to recover attorney's fees." In its Memorandum, Plaintiff notes that Mr. Anderson only represented the Defendant during Mr. Walsh's testimony, a time period that lasted "only a few hours." Nonetheless, Defendant alleges that Mr. Anderson's services cost it "thousands and thousands" of dollars.

The Court finds the Defendant's argument here unpersuasive for several reasons. First, Mr. Anderson's services appear, without any further evidence, to be relatively minimal and the statute does not provide for attorney fees in the circumstance of this case where the condemnation action was not abandoned and dismissed as a result. Second, there is no Affidavit from Mr. Anderson or Defendant as to the attorney fees relating to Mr. Anderson's work.

V.

Additionally, Defendant's Motion comes close to being nothing more than a Motion for Reconsideration, which is not allowed under Utah law. Except on the issue of costs, by Defendant's own admission, much of the Motion consists of restatements or clarifications of arguments which were included in their first Motion but felt this Court overlooked or misinterpreted.

For the foregoing reasons, Defendant's Motion is GRANTED in part and DENIED in part.

Defendant may recover costs for the items detailed above to the amount of $1,199.33. However, awards for all other costs and attorney's fees are denied.

Dated this 3rd day of August, 2011.

ROBERT P. FAUST
DISTRICT COURT JUDGE

Tab E

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ATTORNEY FOR DEFENDANT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

----------oooooooOoooooooo----------

SALT LAKE COUNTY, a body Corporate and politic of the State Of Utah,	;	**AFFIDAVIT ON COSTS**
Plaintiff,	;	
Vs.	;	Civil No. 070913769
BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, A Utah Corporation,	;	Judge Faust
Defendant,	;	

----------oooooooo0oooooooo----------

STATE OF UTAH)
SS:
COUNTY OF SALT LAKE)

JOHN WALSH, being first duly sworn on his oath deposes and says that the following is true and correct to the best of his knowledge, information and belief:

1. Affiant is Counsel of Record in the above entitled action and therefore his first hand knowledge of the facts and circumstances that follow.

2. Affiant prepared Exhibit A attached hereto and by this reference incorporated herein, which reflects a total in costs of $13,949.52.

3. Affiant submits that this total is correct of his own personal knowledge and belief and the sums were a reasonable amount for the item or service provided and that the same were necessarily incurred in this action.

4. Affiant submits that the Defendant is entitled to the said sum of $13,949.52 based upon Cornish Town vs. Koller, 817 P.2d 305 (Utah, 1991) which provides that the Defendant is entitled "in covering every conceivable expense, damage and costs in order to protect the owners of private property."

Dated this 2nd day of June, 2011.

JOHN WALSH
ATTORNEY AT LAW

VERIFICATION

Pursuant to Utah Code Annotated Section 46-5-101, I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Dated this 2nd day of June, 2011.

JOHN WALSH
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing AFFIDAVIT ON COSTS to the Plaintiff by mailing the same to DONALD HANSEN, DEPUTY COUNTY ATTORNEY, 2001 SOUTH STATE STREET, SUITE S3700, SALT LAKE CITY, UTAH, 84190.

Dated this 2nd day of June, 2011.

JOHN WALSH
ATTORNEY AT LAW

EXHBIT A - COSTS

10/17/07 - Jury Demand - $75.00
01/17/08 - DepoMax Merit – Linda Hamilton $381.49
01/17/08 - DepoMax Merit – Andrea Pullos $292.94
02/08/08 - Salt Lake County Surveyor - $10.00
03/06/08 - Copies – Courthouse $2.25
03/19/08 - Salt Lake County Recorders Office $2.00
04/01/08 - Jerry Webber - $2,000.00
04/08/08 - Copies – Courthouse $7.35
04/22/08 - AMT Printing - $23.36
04/23/08 - AMT Printing - $30.97
05/05/08 - Office Max $74.67
05/05/08 - AMT Printing - $95.40
05/06/08 - Office Max (Refund) ($21.32)
05/06/08 - AMT Printing - $5.31
05/08/08 - Courthouse Parking $8.00
06/05/08 - AMT Printing - $3.21
06/06/08 - Courthouse Parking $8.00
06/09/08 - Clerk – Audio Tape Copy - $10.00
06/10/08 - Courthouse Parking $4.00
07/16/08 - Courthouse Parking $4.00
12/11/08 - Courthouse Parking - $4.00
12/12/08 - Copies $16.05
8/19/10 – Office Max $21.16
8/19/10 – A.M.T. $45.30
8/19/10 – Matheson Courthouse $2.00
8/19/10 – Copying $16.75
8/20/10 – Office Max $21.77
8/23/10 – A.M.T. $49.53
9/7/10 – DepoMaxMerit $300.00
9/7/11 – Matheson Courthouse - $2.00
9/9/10 – Smiths $6.40
9/9/10 – A.M.T. $3.59
9/16/10 – Matheson Courthouse $4.00
10/29/10 – DepoMaxMerit Refund $9.30
11/19/10 – A.M.T. $53.30
11/19/11 – Jerry Webber $1,000.00
11/30/1- Matheson Courthouse $.40
12/21/10 – Matheson Courthouse $4.00
1/28/11 – Q and A Reporting Inc. Karrington $149.90
1/31/11 – Matheson Courthouse $2.00
2/1/11 – Matheson Courthouse $2.00
2/3/11 – Matheson Courthouse $.25
2/3/11 – Matheson Courthouse $6.00

2/16/11 – Matheson Courthouse $8.00
2/17/11 – Matheson Courthouse $8.00
3/8/11 – Tosh Kano $1,420.00
3/10/11 – Blake Karrington $2,400.00
3/22/11 – Postage $4.07
4/1/11 – Matthew Roblez/McNeil Engineering $5,373.12

TOTAL $13,949.52

Tab F

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY, a body corporate and politic of the State of Utah,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 070913769
vs.	:	
BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, a Utah Corporation,	:	
Defendant.	:	

This condemnation action by Salt Lake County (the "County") came before the Court on February 16-17, 2011. The Court has reviewed the relevant legal authority and has considered the testimony adduced at the hearing and the exhibits which were entered into evidence. Being now fully informed, the Court rules as stated herein.

LEGAL ANALYSIS

As factual background, this is a condemnation action brought by the County which contemplates taking a portion of the Defendant's land for the purpose of enlarging the current turnaround in the Pinecrest area of Emigration Canyon. At the request of and in the presence of both parties, the Court made an on-site inspection of the location involved in the proposed condemnation.

On May 8 and 9, 2008, and June 6 and 10, 2008, the Court heard the County's Motion for Immediate Occupancy. The principal issue at that

time was whether, under Utah Code Ann., § 78-34-5(1), the County had located the proposed turnaround in a manner that would be most compatible with the greatest public good and the least private injury. At the time, the County proposed to condemn approximately 787 square feet of the subject property ("the original proposal"). Ultimately, the Court denied the County's Motion for Immediate Occupancy.

Thereafter and before this current trial, the County modified the shape/configuration of the property to be taken which resulted in the County reducing the amount of property sought in the condemnation from approximately 787 square feet to approximately 111 square feet. ("the reduced proposal"). Both parties conducted additional discovery and took depositions regarding the proposed change to the final plan of condemnation.

The Court notes that the County has met the requirements of Utah Code Ann., § 78B-6-504, with the reduced proposal. However, in addition to the requirements of § 78B-6-504, the parties agree that the Court must determine whether the County has located the proposed turnaround in a manner that would be most compatible with the greatest public good and cause the least private injury. The County has not met this standard.

The County modified the shape/configuration of the property to be taken and reduced it to 111 square feet. Initially, it appears that this modified proposal will reduce the impact to the private property owner. However, in reality the injury to the private property owner is as great

as it was under the original proposal. This fact is due to the unique zoning, building and parking requirements in Emigration Canyon. The Court finds that the taking of even 111 square feet at this particular location would result in almost a total loss of the value of the lot at its highest value.

Initially, Mr. Webber, MAI, one of the experts testifying in this case, provided a report which placed the value of the property to be taken under the original plan to be $105,000.00. See Exhibit 150. Mr. Webber, however, testified at trial the value of the 111 square feet to be taken in the amended condemnation would be only $5,000.00. The reason given by Mr. Webber for the $100,000.00 decrease in value is due to the supposed decrease in the impact upon the remaining property after the taking. For the original proposal, Mr. Webber determined approximately 50% of the land area which could be built upon would be taken and, therefore, the remaining property was not sufficient to be used as a residence. Under the modified proposal, Mr. Webber assumed that a 1,350 square foot home could still be built on the property. Therefore, the remaining property remained useable for residential building. However, Mr. Webber's assumptions were based upon other assumptions which proved unreliable. Specifically, Mr. Webber believed that the water tanks would be removed entirely off of the property under both scenarios, and not merely shifted or moved on-site.

Under cross-examination, Mr. Webber acknowledged the entire parcel could be rendered unuseable as a residential site under the modified proposal if the tanks remained on the lot and just moved or shifted to a different location on the same lot and testified the Defendant's damages would be very near to the damages under the original proposal. See record at 10:06-9, 10. Mr. Webber's concessions are supported by Blake Karrington's testimony. Mr. Karrington testified that moving the tanks on the lot would critically limit where support columns or footings could be placed for the construction of a residence and the needed parking. This fact would in effect render the remaining property unuseable as a building lot.

In addition, the Court finds the County did not prove that relocating the water tanks off of the lot entirely and replacing them at a new location is a feasible solution. Certainly this would encumber a new location and this relocation was not included in the calculations of damages resulting from any taking. The County failed to specifically indicate where the water tanks would be relocated or what impact there may be to the property upon which the tanks were relocated.

Based upon the foregoing evidence, the Court concludes in applying the balancing it is required to do, it should consider the loss of the entire parcel, not just the 111 square feet which would be transferred to the County as proposed. The Court must then weigh this loss against the public good which would result from the condemnation.

Ms. Pullos testified for the County regarding the County's efforts to enlarge the turnabout. She stated that she was the sole person who determined the location and extent of both the original and amended taking in this case. Ms. Pullos testified she did not consider the turnaround as a whole, looking for options that did not include taking Defendant's property. Instead, she only considered what she could do on that corner of the turnaround involving this property in view of what of what had already occurred relating to the turnaround in the other three corners thereof and she testified that she wanted to use a standard radius on Roosevelt Trail. Ms. Pullos acknowledged she had no knowledge of the size, depth or orientation of the water tanks on the property and she was only aware of the locations of the openings to the water tanks.

Ms. Pullos testified she limited her amended design because she only considered the property that had been already acquired by the County. Ms. Pullos did not adequately consider alternative property that could be condemned with less impact upon private landowners. Further, Ms. Pullos acknowledged she has heard no complaints about the present turnaround configuration that is in place. Ms. Pullos testified she did not factor in whether the modified proposal would go over the water tanks. For this modified proposal, Ms. Pullos again did not consider anything more than what the County already had in its possession for property in the other three corners of the turnaround. The County, however, failed to properly consider property it already owns and whether

it could be utilized to effectuate a turnaround without the taking of this property. Also, the County, through Ms. Pullos, failed to properly consider 8 to 10 feet of property which is already paved and another 10 feet from the edge of the blacktop to the foliage which is unused to the east. Some of this property is already owned by the County and some of it is privately owned but is in reality already being currently used as a turnaround even though it is not within the currently designed turnaround.

The Court finds the taking and use of the property to the east as mentioned above, would pose significantly less private injury and less cost to the County and public than the modified proposal, even though more than 111 square feet may ultimately have to be taken. As mentioned, the properties to the east are currently being used as part of the turnaround and as an entrance to a private roadway/driveway. Even though more land than 111 square feet may have to be taken, the land value per sq. ft. is substantially less than the property currently proposed. Further, taking the land to the east would not result in the loss of a building site, which value is approximately $105,000.00 and which would also include the costs of the movement of the water tanks on its current lot which is estimated to be $25,000.00. The Court recognizes that if the water tanks on Defendant's property were relocated to a completely new site, the damages to the lot would not be close to the $105,000.00, because the remaining lot would or could still be used

as a residential lot. However, the damages and cost for impacting the property upon which the tanks were relocated would have to be provided and included.

The modified proposal simply adds a curve or radius to a corner to assist larger vehicles in backing up, so when they drive forward the front end of the vehicle is more in the direction of travel i.e., down the canyon. Under the modified proposal, a vehicle pulling into Roosevelt Trail and then backing up while turning to match the proposed curve has 29.00 ft of curvature but only 20 ft in depth in a straight line to back up. See Exhibit 159. However, under the status quo, vehicles effectuate a turn around without needing to stop and backup. Larger trucks and vehicles needing to turn around can presently pull into Roosevelt Trail and have a distance of 102 feet to back up in a straight direction to help effectuate their turn, rather than 20 ft. to 29 ft. See Exhibit 169E.

After weighing the testimony and evidence that was presented at the hearing, the Court finds that the County's amended design of the proposed turnaround is not the most compatible with the greatest public good and the least private injury and was done without adequately considering the impact on the adjoining lands, use of adjoining lands to effectuate a turnaround, the water system currently in place, and the parking situation and its impact on future development.

Based on the foregoing, the County's Petition for Condemnation is denied. This Memorandum Decision shall serve as the Order in this matter. No further order need be prepared by counsel.

Dated this 15th day of March, 2011.

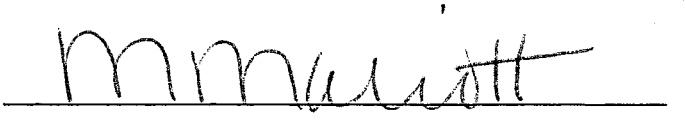
ROBERT P. FAUST
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 15th day of March, 2011:

Donald H. Hansen
David H.T. Wayment
Deputy District Attorneys
Attorneys for Plaintiff
2001 S. State Street, Suite S3700
Salt Lake City, Utah 84190-1200

John Walsh
Attorney for Defendant
3191 S. Valley Street, Suite 230
Salt Lake City, Utah 84109



Tab G

LOHRA L. MILLER (USB #6420)
DISTRICT ATTORNEY FOR SALT LAKE COUNTY
DONALD H. HANSEN (USB #1332)
DAVID H. T. WAYMENT (USB # 5159)
Deputy District Attorneys
2001 South State Street, #S3700
Salt Lake City, Utah 84190-1200
Telephone: (801) 468-3421
Facsimile: (801) 468-2622
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE DEPARTMENT SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY, a body corporate and politic of the State of Utah, Plaintiff, *vs.* **BUTLER CROCKETT & WALSH DEVELOPMENT CORPORATION** , a Utah corporation, Defendant	**PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE** Civil No. 070913769 Judge ROBERT FAUST

Pursuant to UTAH RULES OF CIVIL PROCEDURE, Rule 41(a)(2)(ii), Plaintiff Salt Lake County, by and through its counsel of record, hereby moves the court for an order dismissing the above-captioned matter with prejudice.

//

//

//

DATED this December 5, 2008.

LOHRA L. MILLER
District Attorney for Salt Lake County

DONALD H. HANSEN
DAVID H. T. WAYMENT
Deputy District Attorneys
Attorneys for Plaintiff

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that the foregoing **PLAINTIFF'S MOTION TO FOR VOLUNTARY DISMISSAL WITH PREJUDICE** was duly served upon counsel for the defendant by United States First Class mail, postage prepaid, as follows:

John T. Walsh
Attorney at Law
3191 South Valley Street
Suite # 230P
Salt Lake City UT 84109
Attorney for BUTLER CROCKETT & WALSH DEVELOPMENT CORPORATION, a Utah corporation

Kevin E. Anderson
Attorney at Law
60 East South Temple Street
Suite # 1200
Salt Lake City UT 84111
Attorney for BUTLER CROCKETT & WALSH DEVELOPMENT CORPORATION, a Utah corporation

DATED this 5th day of Dec, 2008.

Tab H

JOHN WALSH
ATTORNEY AT LAW #3371
3191 SOUTH VALLEY STREET, SUITE 230
SALT LAKE CITY, UTAH
84109
Telephone: (801) 467-9700

ATTORNEY FOR DEFENDANT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

----------oooooooOoooooooo----------

SALT LAKE COUNTY, a body Corporate and politic of the State Of Utah,

Plaintiff,

Vs.

BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, A Utah Corporation,

Defendant,

ORDER DENYING MOTION FOR IMMEDIATE OCCUPANCY

Civil No. 070913769

Judge Faust

----------oooooooo0oooooooo----------

The above entitled matter came on regularly for an Evidentiary Hearing on the Plaintiff, Salt Lake County's Motion for Immediate Occupancy, before the Honorable Robert Faust, District Court Judge, on May 8TH, May 9TH, June 6TH and June 10TH, 2008, with the Plaintiff, Salt Lake County appearing by and through Donald H. Hansen and David H. T. Wayment, Deputy District Attorneys, and the Defendant, Butler, Crockett

and Walsh Development Corporation, appearing by and through John Walsh, Attorney at Law and Kevin Egan Anderson, Attorney at Law, and the Court after making a site visit to the subject property on May 8TH, 2008, and hearing the testimony of the various witnesses and considering all of the exhibits and evidence adduced, and after entering its FINDINGS OF FACT and CONCLUSONS OF LAW now for good cause appearing does hereby,

ORDER, that the Plaintiff's Motion for Immediate Occupancy is hereby denied .

Dated this 6 day of ~~August~~ 8/6/08, 2008.

BY THE COURT:

DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the ORDER DENYING MOTION FOR IMMEDIATE OCCUPANCY, to the Plaintiff by mailing the same to Donald H. Hansen, Deputy District Attorney, 2001 South State Street, Suite #S3700, Salt Lake City, Utah, 84190.

Dated this 14th day of August, 2008.

JOHN WALSH
ATTORNEY AT LAW

Tab I

JOHN WALSH
ATTORNEY AT LAW #3371
3191 SOUTH VALLEY STREET, SUITE 240
SALT LAKE CITY, UTAH
84109
Telephone: (801) 467-9700

ATTORNEY FOR DEFENDANT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

----------oooooooOoooooooo----------

SALT LAKE COUNTY, a body Corporate and politic of the State Of Utah,

Plaintiff,

Vs.

BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, A Utah Corporation,

Defendant,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 070913769

Judge Faust

----------oooooooo0oooooooo----------

The above entitled matter came on regularly for an Evidentiary Hearing on the Plaintiff, Salt Lake County's Motion for Immediate Occupancy, before the Honorable Robert Faust, District Court Judge, on May 8TH, May 9TH, June 6TH and June 10TH, 2008, with the Plaintiff, Salt Lake County appearing by and through Donald H. Hansen and

David H. T. Wayment, Deputy District Attorneys, and the Defendant, Butler, Crockett and Walsh Development Corporation, appearing by and through John Walsh, Attorney at Law and Kevin Egan Anderson, Attorney at Law, and the Court after making a site visit to the subject property on May 8TH, 2008, and hearing the testimony of the various witnesses and considering all of the exhibits and evidence adduced, now for good cause appearing makes and adopts the following,

FINDINGS OF FACT

1. That the Plaintiff, Salt Lake County, initiated this condemnation action and served the Defendant, Butler, Crockett and Walsh Development Corporation, on September 24th, 2007.

2. That the stated purpose of the said condemnation action is to provide a bigger and safer turnaround at the approximate intersection of Burrs Lane and Roosevelt Trial, in the Pinecrest area of Emigration Canyon, Salt Lake County, State of Utah as reflected in Defendant's Exhibit #118.

3. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered what properties already belonged to Salt Lake County versus property that required a taking from private property owners.

4. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the

areas of public property in the same vicinity of the proposed turnaround where Salt Lake County could stockpile snow, as reflected in Exhibits #125, #126, #128 and #130.

5. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the fact that Salt Lake County already had a snow blower and front end loader that Salt Lake County utilizes in the same area as the turnaround, as the need arises, to remove snow and ice from the existing road and turnaround area. Hence, Salt Lake County has alternative locations in which to stock pile snow without taking any of the Defendant's property.

6. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the fact that east side of the proposed turnaround as well as the east side of the road, have far better potential for melting the snow than the west side as the west side had much more shade because of the evergreen trees on the west side as well as the mountain side, all of which shade the area she had designed for snow storage. Hence, getting the snow to melt more quickly, would be an advantage to Salt Lake County for snow removal purposes and the potential for the same would exist after every snow fall all winter long.

7. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the fact that the stream provided a never ending source to deposit the snow, which is where

the snow plows plow the snow anyway, and therefore there would be no need to take any of the Defendant's property for storing or stock piling snow.

8. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the fact that Salt Lake County had paved the area of public land reflected in Defendant's Exhibit #129, which was outside of the proposed turnaround Ms. Pullos had designed. Andrea Pullos testified as reflected in Defendant's Exhibit #1, at page 27, ". . . the conceptual plan leaves part of the blacktop area unused on the east . . . (which was) . . . eight to ten feet. . ."

9. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the fact that Salt Lake County had an additional ten feet from edge of black top to edge of foliage to move the turnaround to the east, or to stock pile snow which was totally unused in the proposed turnaround Ms. Pullos had designed. Note Defendant's Exhibit #1, at page 28.

10. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered how much snow builds up in front of the Defendant's stone entrance and gate. As noted in Defendant's Exhibits #74 and #81, the build up of snow in front of the wall is a major

factor to have overlooked, as this significantly affects how much area is available for turnaround purposes and how much is needed for stockpiling snow.

11. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the damages caused to the three water tanks and well head on the west side, whereas there are none of the same on the east side, should the Plaintiff locate the said turnaround consistent with Defendant's Exhibit #127. Should the Defendant have to relocate the subject tanks, the loss sustained by the Defendant could be much more than the loss of the area for the said tanks, as Defendant would need to locate the said tanks on a different lot, assuming land is available. The resultant damages could potentially affect the whole water system, and thereby affect the potential development of many, many more lots than the mere taking of part of Lot 1, Block 9, The Groves Subdivision, as proposed herein by Salt Lake County.

12. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the fact that the east side of the turnaround, where Defendant's proposes that the turnaround be placed as reflected in Defendant's Exhibit #127, had been used as a road area before and that the land owners had so utilized the said land as a road, whereas, on the West side the area had not been used as a road at any time.

13. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos

testified that she had designed the said turnaround herself and she had not considered the fact that the proposed taking would affect the Defendant most significantly as the taking would prevent development of Lots #1 and #2, Block 9, The Groves Subdivision as proposed by the landowner. The resulting damage to the Defendant would deprive the Defendant from having the requisite off street parking and therefore prevent development of Defendant's land far beyond the mere taking proposed by Salt Lake County.

14. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the parking issue exactly the opposite way around. The proposed taking contemplates, in part, providing private parking for Thomas Johnson and others, who have historically ~~had~~ parked in many different hundreds ~~of~~ places ~~to park,~~ whereas the proposed taking by Salt Lake County takes the only parking space for the Defendant and the taking of the requisite parking of the Defendant in reality prevents the Defendant from having a home on Lots #1 and #2, Block 9, The Groves Subdivision. The Court finds that the Defendant will have to demonstrate its off street parking on the site plan in order to get a building permit, and the taking by Salt Lake County herein, prevents the same as they propose to take all of the Defendant's land to toe of slope. The Court finds that the Defendant can not create additional parking to the north of the proposed taking, as the Army Corp of Engineers has prevented the same in the past as the same creates a culvert too long to be acceptable to the Corp.

15 The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos

testified that she had designed the said turnaround herself and she had not considered the fact that Lot 1, Block 9, The Groves Subdivision was unique to the Defendant and very different than any other lot of the Defendant, in that this lot has access in the winter as the road is plowed to edge of this lot and such is not the case with any other lot of the Defendant. Additionally this lot had a culvert where the stream is protected and therefore the Defendant has unique development opportunities as the same would have less affect on the stream. Additionally this lot has electrical, gas, telephone and water already in place for development, etc.

16. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the fact that there is sufficient flat area for the turnaround contemplated in Defendant's Exhibit #127. On Cross Examination Andrea Pullos showed the Court on the County survey map where the grades where such that there was sufficient flat area in order to build the turnaround as contemplated in Defendant's Exhibit #127.

17 The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the greatest public good, as Andrea Pullos testified that she had designed the said turnaround herself and she had only considered pushing snow on Defendant's property for storage purposes. Note Defendant's Exhibit #1 at page 56 along with Defendant's Exhibit #86 and #94. The Court finds this analysis by Plaintiff to be flawed as merely pushing snow on Lot 1, Block 9, The Groves Subdivision in contrast to stock piling snow there, indicates to the Court that very little volume is contemplated in the same, whereas there is so much more volume available by

placing the snow on Roosevelt Trail to the East and West as well as the platted Burrs Lane, as reflected in Defendant's Exhibits #125, #128 and #130.

18. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the greatest public good, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the fact of how snow removal had historically been done in the area. The Court finds this to be most significant as a good part of the taking of the Defendant's land is for snow storage and other available sites for snow storage directly affects the County's need to take the Plaintiff's land for the same.

19. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the greatest public good, as Andrea Pullos testified that she had designed the said turnaround herself and she had not considered the potential costs in relocating the water tanks, other land that would be needed to relocate the tanks, and whether the whole water system would be affected and how the loss of water system could affect the development of unnumbered lots and hence the expense of putting the turnaround over the water tanks could be astronomical.

20. The Court finds that Salt Lake County has not acted reasonably nor in good faith in this condemnation action and that the Order of Immediate Occupancy should be denied because:

a. Salt Lake County gave no thought to the fact that there are ~~unlimited~~ many places to stock pile snow in the area, as reflected in Defendant's Exhibits #125, #128 and #130.

b. Salt Lake County gave no thought as to snow blowing the snow on the East side of the stream and did not even factor in the fact that Salt Lake County already has

the equipment, has the manpower, and has historically used the said equipment in the same area of the turnaround, as Salt Lake County has needed the same to keep the road open during the winter months. Note Defendant's Exhibits #69, #70 and #71.

c. Salt Lake County gave no thought to the fact that there is much more sun to melt down the snow on the East side of the road and turnaround than the west on the Defendant's property because of the Evergreen trees and shade of the mountain as reflected in Exhibits #64, #65, #66 and #86.

d. Salt Lake County gave no thought to the fact that Salt Lake County plows the snow with its accompanying salt, oil, antifreeze etc., into the stream, all the way from the Zoo to the proposed turnaround and that the stream provides an never ending source for removing the ice and snow and water from the area. Note Exhibit #1, (which was admitted into evidence) at page 36.

e. Salt Lake County gave no thought to the fact that there are no homes or structures on the East side of the road and turnaround where Salt Lake County could stock pile and snow blow the snow, whereas there are both homes and structures on the West side where Salt Lake County proposes to store the snow. Note Exhibit #64.

f. Salt Lake County gave no thought as to the detrimental effect that the salt and oil and antifreeze, etc., (note Exhibits #75, #77 and #86) that commonly mix with snow can have not only on the two water tanks on the Defendant's property but also on the community water tank and system which is currently in place just below the two tanks of the Defendant. Note Defendant's Exhibit #141 with the fence around the community water tank.

g. In sharp contrast Salt Lake County gave no thought to the fact that on the East side of the turnaround there is many times the snow storage capacity than on the Defendant's property to the West. Note Defendant's Exhibit #103.

21. As to the claim made by the Defendant that the Order of Immediate Occupancy should be denied because Salt Lake County invoked their power of eminent domain arbitrarily, the Court finds as follows:

a. The proposed turnaround by Salt Lake County contemplates the taking on one-hundred per cent of the flat area on the Defendant's side of the said turnaround, while at the same time, the proposal leaves several feet to the East totally ~~abandoned~~ unused. At pages 27 and 28 of Defendant's Exhibit #1, Andrea Pullos testified that she left 8 to 10 feet of black top unused on the East and another 10 feet from black top to foliage unused to the East.

b. The proposed turnaround by Salt Lake County contemplates taking the only parking space for the Defendant's proposed development of Lots #1 and #2, Block 9, The Groves subdivision, while at the same time the proposed turnaround provides for several private parking spaces for Thomas Johnson and others on Lots #30 and #31, Block 7, The Groves Subdivision. Note Defendant's Exhibit #118..

22. The Court finds that Salt Lake County has not acted reasonably nor in good faith in this condemnation action and that the Order of Immediate Occupancy should be denied because the proposed turnaround by Salt Lake County contemplates the taking of the property of the Defendant in order to make a turnaround or road on Defendant's property, where Defendant contemplates building a home, whereas Salt Lake County is ~~abandoning~~ ignoring the turnaround area to the East which has no other intended purpose and

historically has been used as a road. Note Defendant's Exhibit #129, which shows blacktopped area that Salt Lake County is abandoning in their proposal.

23. The Court finds that the Plaintiff has not located the proposed turnaround in a manner which will be most compatible with the least private injury and the greatest public good.

24. The by virtue of all of the foregoing the Court finds that the Plaintiff has not acted reasonably nor in good faith and that the Motion of Immediate Occupancy should be denied for arbitrariness.

From the foregoing FINDINGS OF FACT, the Court now makes and adopts the following:

CONCLUSIONS OF LAW

25. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has not located the subject turnaround in a manner which will be most compatible with the least private injury, as required by 78-34-5 of the Utah Code Annotated.

26. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has not located the subject turnaround in a manner which will be most compatible with the greatest public good as required by 78-34-5 of the Utah Code Annotated.

27. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has acted arbitrarily as contemplated in Salt Lake County vs. Rammoselli, 567 P.2d 182 (Utah, 1977).

28. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because there is no need for the taking and the taking is not necessary as contemplated in Salt Lake County vs. Rammoselli, 567 P.2d 182 (Utah, 1977) and as set out in the Utah Code Annotated 78-34-4.

29. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has abused its discretion in the proposed taking as contemplated in Bountiful vs. Swift, 535 P.2d 1236 (Utah, 1975).

30. The Court concludes as a matter of law that the Order of Immediate Occupancy should be denied because Salt Lake County has not acted reasonably nor in good faith in the proposed taking as contemplated in UDOT vs. Fuller, 603 P.2d 814, (Utah, 179) also Bountiful vs. Swift, 535 P.2d 1236 (Utah, 1975).

Dated this 23rd day of ~~September~~ October, 2008.

BY THE COURT:

DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, to the Plaintiff by mailing the same to Donald H. Hansen, Deputy District Attorney, 2001 South State Street, Suite #S3700, Salt Lake City, Utah, 84190.

Dated this 17th day of September, 2008.

JOHN WALSH
ATTORNEY AT LAW

Tab J

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY, a body corporate and politic of the State of Utah,	:	MINUTE ENTRY
	:	CASE NO. 070913769
Plaintiff,	:	
vs.	:	
BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, a Utah Corporation,	:	
	:	
Defendant.		

This matter came before the Court for an evidentiary hearing in connection with Salt Lake County's (the "County") Motion for Immediate Occupancy on May 8 - 9, June 6 and 10, 2008. At the conclusion of the hearing on June 6, 2008, the Court gave counsel the opportunity to file supplemental briefs. The Court has now had an opportunity to consider the parties' supplemental materials, as well as their proposed Findings of Fact and Conclusions of Law. In addition, the Court has reviewed the relevant legal authority and has again considered the testimony adduced at the hearing and the exhibits which were entered into evidence. Being now fully informed, the Court rules as stated herein.

LEGAL ANALYSIS

As factual background, the Court notes that this is a condemnation action brought by the County which contemplates taking a portion of the Defendant's land for the purpose of enlarging the current turnaround and to provide parking in the approximate area of Burrs Lane and Roosevelt Trail, in the Pinecrest area of Emigration Canyon.

The principal issue presented by the Defendant is whether, under Utah Code Ann., § 78-34-5(1), the County has located the proposed turnaround in a manner that would be most compatible with the greatest public good and the least private injury. The parties agree that it is procedurally appropriate for the Court to apply Section 78-34-5(1) at this stage in the condemnation process so that the Court can ultimately determine whether an Order of Immediate Occupancy should be entered.

After weighing the testimony and evidence that was presented at the hearing, the Court finds that the County designed the proposed turnaround without adequately considering the impact on the adjoining land, the water systems currently in place, the burden of additional snow storage on the Defendant's property, and the parking situation and its resulting impact on future development. Indeed, it appears that the County already owned certain property, the use of which for a modified turnaround would have posed significantly less private injury. Yet, the testimony of

Andrea Pullos, a Salt Lake County Engineer, suggests other designs which could have incorporated this land and which would have been potentially less injurious, were not considered. In addition, the design which she ultimately proposed simply did not take into full account specific factors that affect the Defendant's property, such as snow build-up and the placement of water tanks. While Ms. Pullos testified she was the sole person who determined the location and extent of the taking in this case, she testified twice, under cross-examination, that she did not locate the taking of the property in a manner which would be most compatible with the greatest public good and the least private injury.

The Court concludes that this failure suggests a level of disregard which rises to arbitrariness in locating the proposed turnaround. This, in turn, provides sufficient grounds for the Court to deny the Order of Immediate Occupancy, as that occupancy is currently framed.

The Court notes that a corollary issue raised by the Defendant is whether the purpose of the proposed condemnation meets the requirements of Utah Code Ann., § 78-34-4. While it appears that the County could potentially meet these requirements, the issue becomes moot because the Defendant has a complete defense to the condemnation action. Specifically, the County has not acted reasonably or in good faith, as evidenced, in part, by its complete failure to consider the standard of

public good versus private injury in locating the proposed turnaround, including failing to weigh other options involving County land, with potentially less impact.

Based on the foregoing, the County's request for an Order of Immediate Occupancy is denied. Counsel for the Defendant is to prepare Findings of Fact and Conclusions of Law consistent with, but not limited to, this Memorandum Decision. Counsel should include citations to the appropriate legal authorities which support this Court's legal conclusions.

Dated this 15th day of July, 2008.

ROBERT P. FAUST
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

MAILING CERTIFICATE

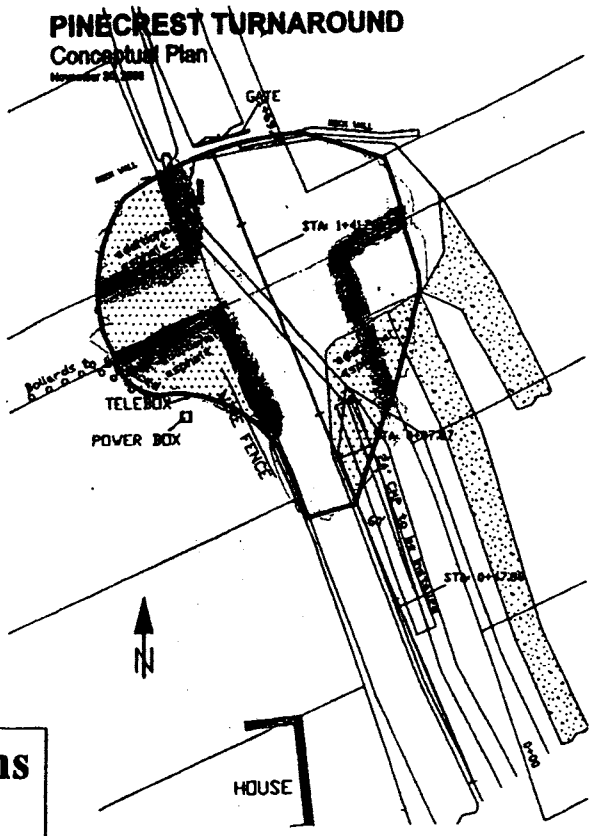
I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 15 day of July, 2008:

Donald H. Hansen
David H.T. Wayment
Deputy District Attorneys
Attorneys for Plaintiff
2001 S. State Street, Suite S3700
Salt Lake City, Utah 84190-1200

John Walsh
Attorney for Defendant
3191 S. Valley Street, Suite 230
Salt Lake City, Utah 84109

Pat Jones

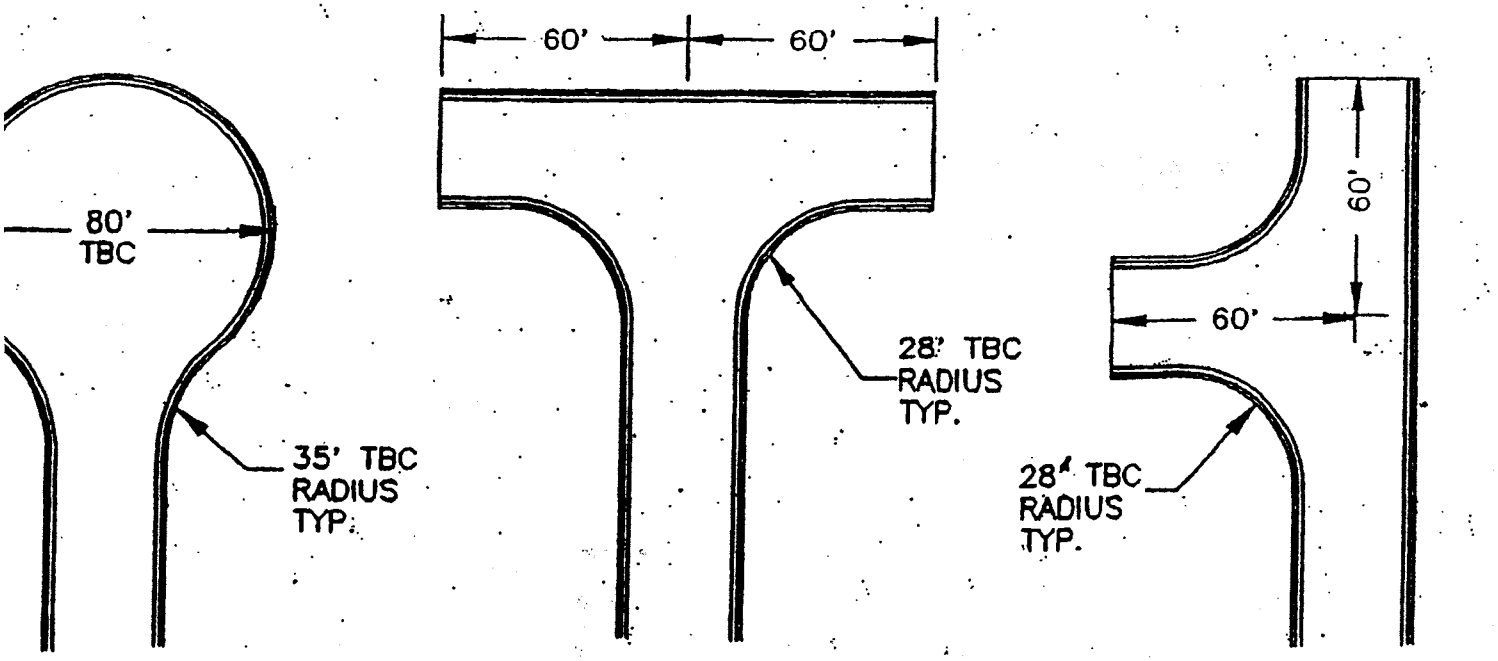
Tab K



DEFENDANT'S EXHIBIT 4

PENGAD 800-631-6989

Scale of All Diagrams is 1" = 50'



METER CUL-DE-SAC

120' HAMMERHEAD

120' HAMMERHEAD ALTERNAT

Tab L

DISTRICT ATTORNEY
SALT LAKE COUNTY

DAVID E. YOCOM
DISTRICT ATTORNEY

SALT LAKE COUNTY

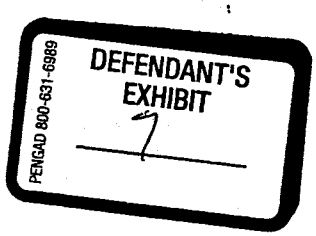
LITIGATION DIVISION

John P. Soltis
Division Director

Jay Stone
Assistant Division Director

RISK MANAGEMENT

Coleen Cronin
Risk Manager



June 21, 2001

Laurie Ann Fraser
2529 East 1300 South
Salt Lake City, Utah 84108

U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED
Certified Mail Article No. 7000 1670 0013 5586 1642
and Regular First Class Mail

Re: **CEASE AND DESIST DEMAND**
Trespass on County Road
Pinecrest Turnaround

Dear Ms. Fraser:

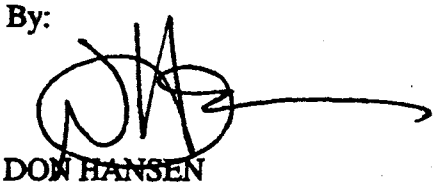
This office represents the interests of Salt Lake County ("County") in and to the paved, County-maintained area at the intersection of Burrs Lane and Roosevelt Trail (locally known and hereafter referred to as the "turnaround") in the Pinecrest District of Emigration Canyon. It is the County's understanding and position that the Utah Third District Court quieted title to the entire paved portion of the turnaround, and the entire platted, as well as the used and traveled, portions of Burrs Lane below Roosevelt Trail, in the County as a public road in 1992. The County has maintained that position continuously since that time.

This office was recently informed that within the past two to three weeks, you erected, or caused to be erected, a steel chain-link fence across a portion of the paved turnaround, and in so doing, you caused damage to the asphalt pavement by digging eleven holes for placement of steel fenceposts. It is our further understanding that the fence was in place for less than one week, has been removed, and that the holes dug in the asphalt have been temporarily filled with concrete. The County regards such actions as trespass and destruction of County property. Accordingly, you are hereby instructed to immediately cease and desist the placement of any fence or other encroachment upon the County's property at the turnaround. In the event of any future

placement by you, or at your behest, of fences or other objects constituting a trespass upon a County road dedicated to public use will result in both removal of such object(s) by the County, and legal action against you.

Additionally, you are now required, within thirty (30) days after the date of this letter, to repair the holes placed in the asphalt turnaround by removing the concrete from such holes and restoring the asphalt surface to its condition prior to your trespass.

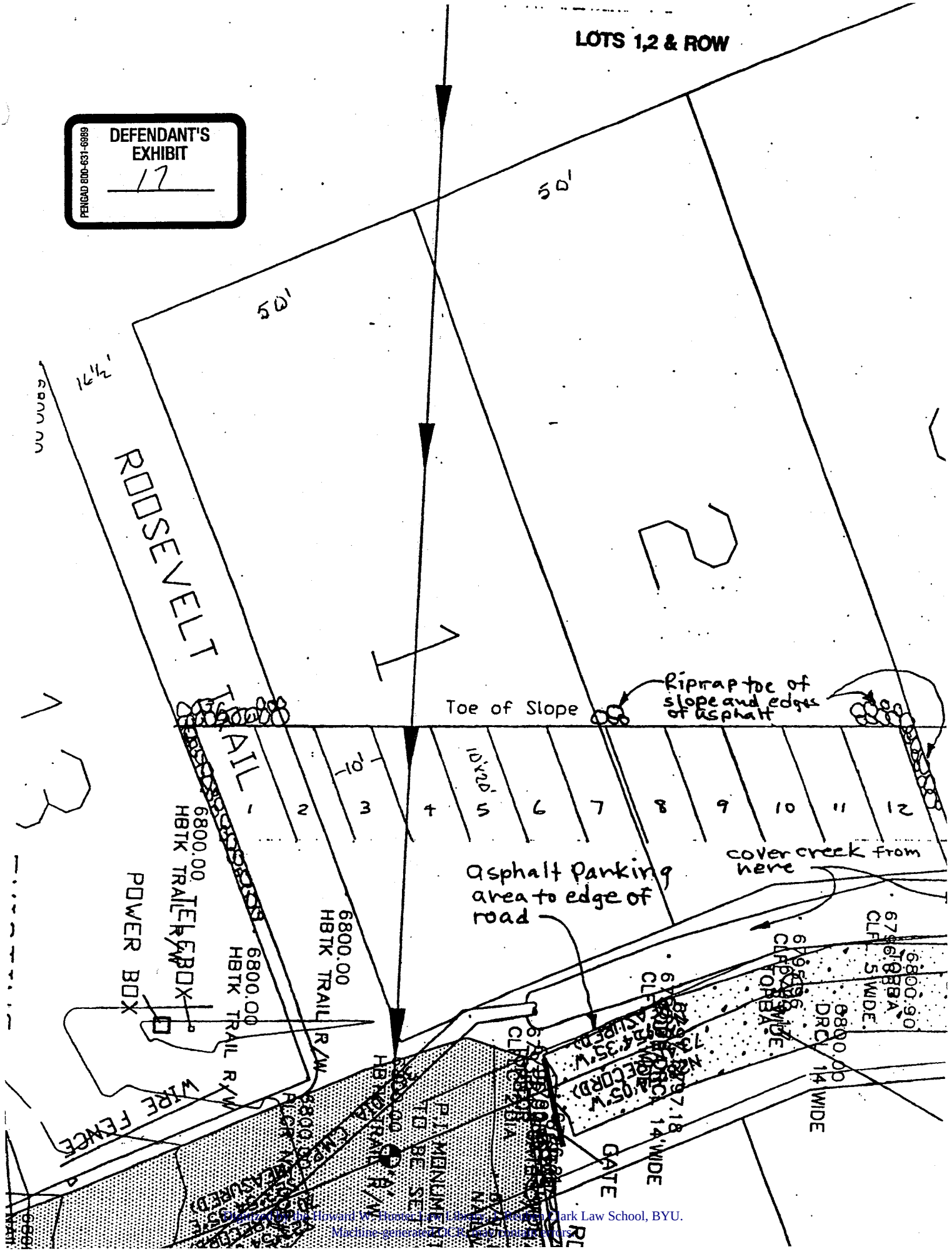
Very truly yours,
SALT LAKE COUNTY DISTRICT ATTORNEY
By:



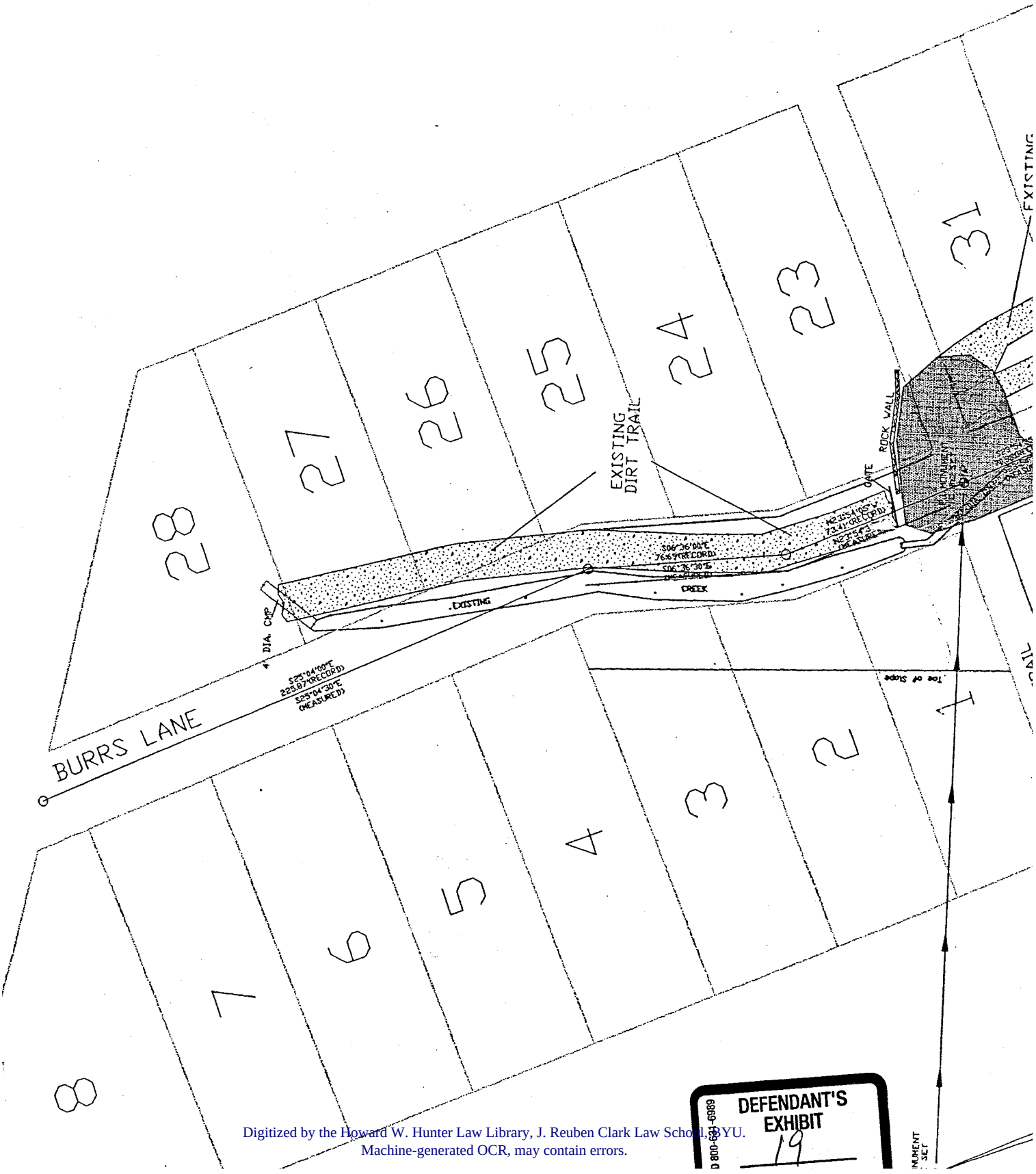
DON HANSEN
Deputy District Attorney
Litigation Division

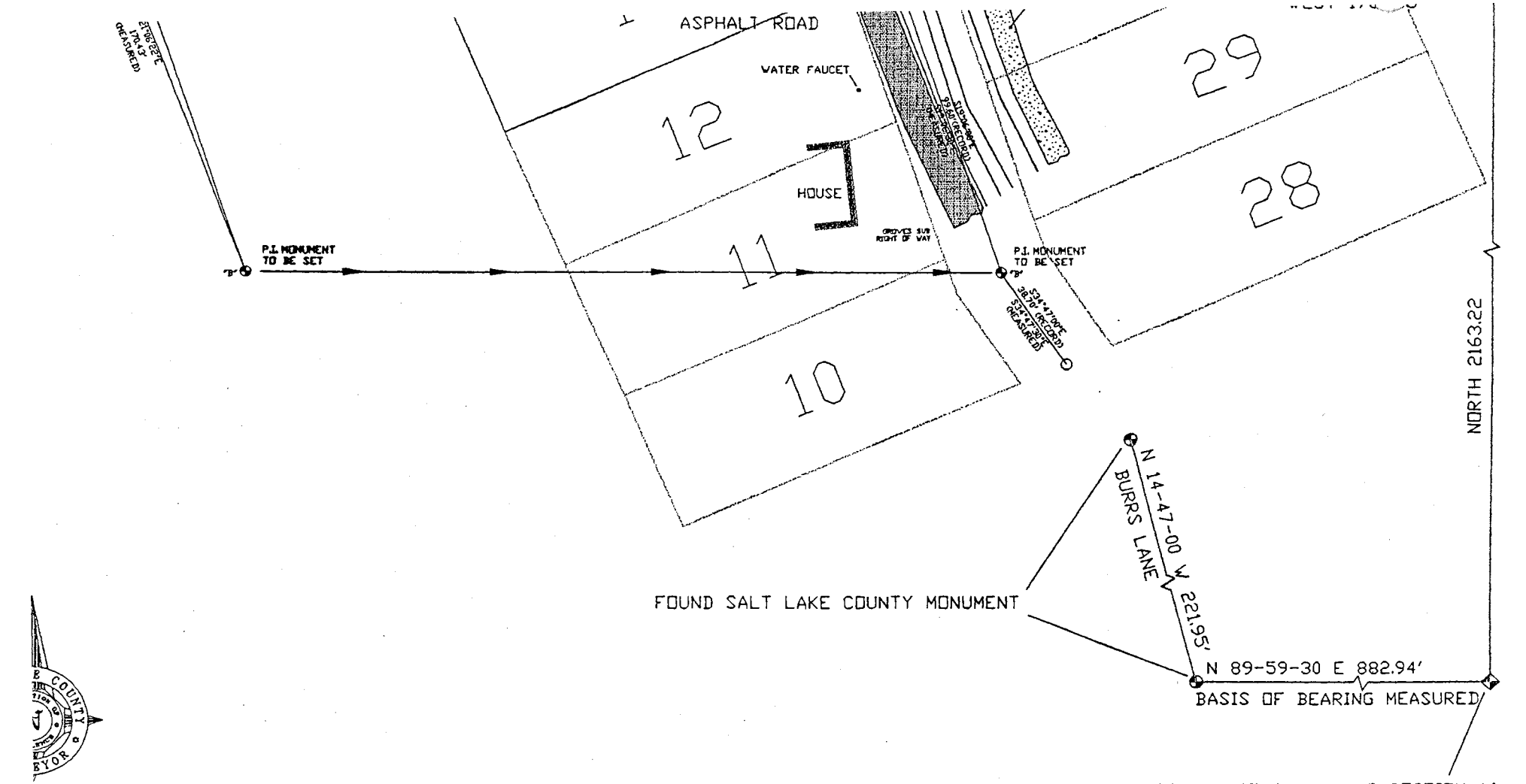
DHH:dh
cc: Roger Hillam (County Real Estate)
Neil Stack (County Engineering)

Tab M



Tab N



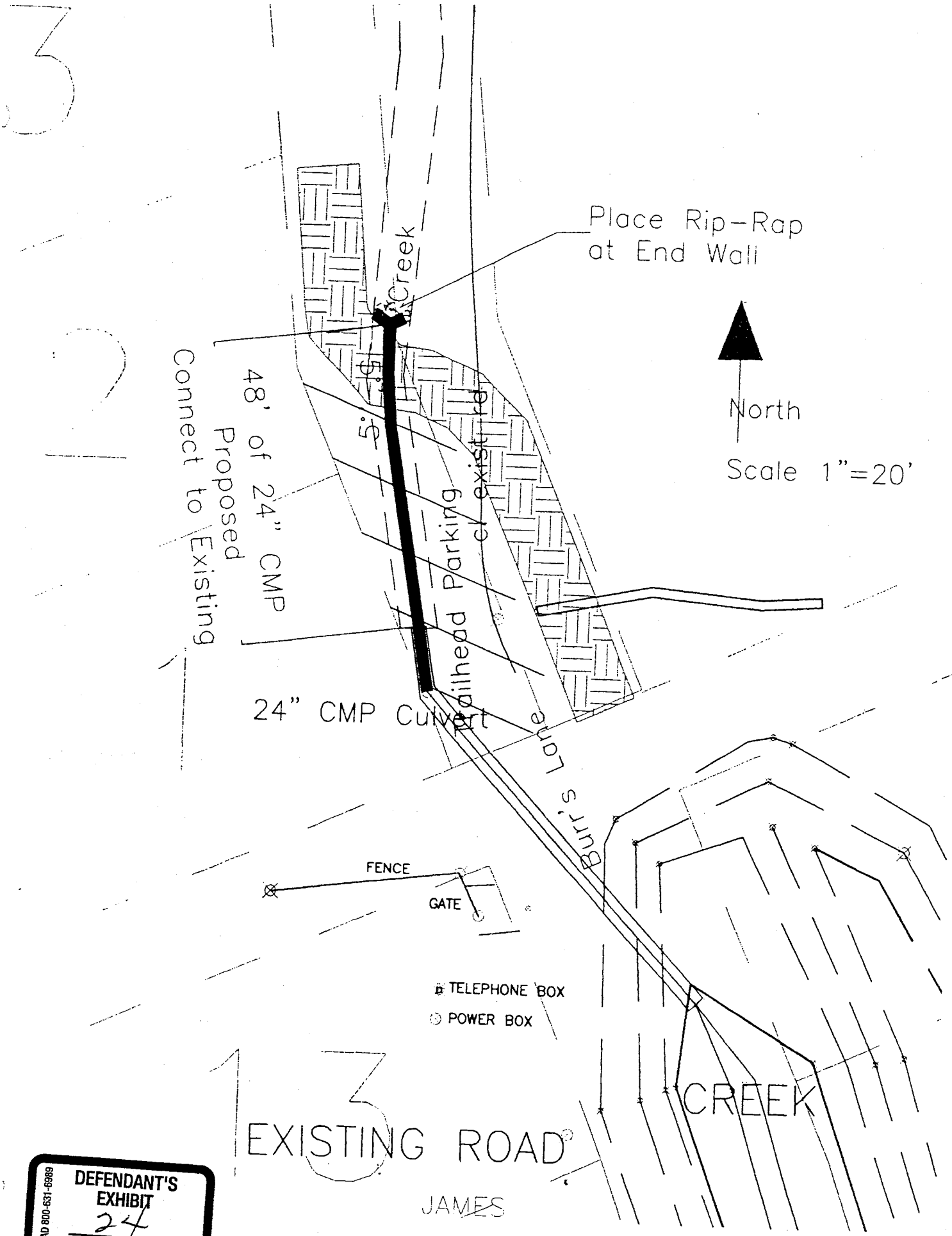


crest Road Extension

Salt Lake County Surveyor

30 0 5 10 20 30 45 60

Tab O



DEFENDANT'S EXHIBIT 24

PEMGAD 800-631-6989

Tab P

Salt Lake County
Board of Commissioners

Jim Bradley CHAIRMAN
Randy Horiuchi
Brent Overson

SALT LAKE COUNTY

SALT LAKE COUNTY
GOVERNMENT CENTER
2001 S. State Street
Suite N2100
Salt Lake City
Utah 84190-1000
Tel (801) 468-3350
Fax (801) 468-3535

August 17, 1994

Mr. David E. Yocom
County Attorney
Government Center, South Bldg.
Salt Lake City, Utah

Attn: Mr. Kent S. Lewis
Deputy Attorney/Civil Division

Dear Mr. Lewis:

The Board of County Commissioners, at its meeting held this day, approved the attached **Resolution No. 2113** in regard to the width of Burr's Lane between the second turnaround and Roosevelt Trail.

The resolution was approved with the following corrections:

Remove the word "significant" from paragraph 3. to read *"No existing trees of ~~significant~~ foliage within the traveled Burr's Lane..."*

Insert the number "15" in paragraph 1. to read *"...between the Second Turnaround (traveled surface plus shoulders) shall be 15 feet except as provided in paragraph 2."*

Pursuant to the above, you are hereby authorized to effect same.

Very truly yours,

BOARD OF COUNTY COMMISSIONERS

SHERRIE SWENSEN, COUNTY CLERK

by _____
Deputy Clerk

hfp
encl.

DEFENDANT'S EXHIBIT 32

PENGAD 800-631-6989

SALT LAKE COUNTY, UTAH

RESOLUTION NO. 2113 DATE August 17, 1994

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY, CONCERNING THE WIDTH OF BURR'S LANE BETWEEN THE SECOND TURNAROUND AND ROOSEVELT TRAIL.

WHEREAS, Burr's Lane, as it is located on the ground between the Second Turnaround (approximately 9000 East) and Roosevelt Trail within the Pinecrest area of Emigration Canyon ("Traveled Burr's Lane"), is maintained by Salt Lake County as a public road; and

WHEREAS, issues and conflicts have arisen concerning the width of the Traveled Burr's Lane; and

WHEREAS, in 1983, Salt Lake County entered into a stipulated settlement with residents and property owners in the Pinecrest area involved in the lawsuit of Walsh, et al. v. Salt Lake County, C-82-4633, wherein the County agreed to reconstruct the Traveled Burr's Lane immediately below Roosevelt Trail to the width of the road existing on the ground prior to its destruction in 1983; and

WHEREAS, plans prepared by Montgomery Engineering for reconstruction of the road show a road 14 feet wide, including two foot shoulders on each side (10 foot traveled surface); and

WHEREAS, the canyon road maintenance map enacted in 1984 shows the Traveled Burr's Lane north of the turnaround to approximately 9055 East where the asphalt ends as a 13 foot wide road (this measurement was based upon the traveled surface) and the remaining

portion of the Traveled Burr's Lane from where the asphalt ends to Roosevelt Trail as an 11' foot wide road (traveled surface) except as modified by the Stipulation; and

WHEREAS, in places the Traveled Burr's Lane has been widened by some property owners over the past few years especially at the top end of the road; and

WHEREAS, the Board of County Commissioners desires to have some consistency in the maximum width of the Traveled Burr's Lane; and

WHEREAS, the Board of County Commissioners has determined that in order to retain the rural mountain setting of the area and to protect trees, shrubs, and the stream, the road should remain narrow;

NOW, THEREFORE, the Board of County Commissioners determines as follows:

1. The Traveled Burr's Lane shall be at a maximum of a 13 foot wide traveled surface. The total width of the Traveled Burr's Lane maintained by the County between the Second Turnaround (traveled surface plus shoulders) shall be 15 feet except as provided in paragraph 2.

2. The Board of County Commissioners may designate wider pull-off and passing areas after receiving a recommendation from the Public Works Department.

3. No existing trees or ~~significant~~ foliage within the Traveled Burr's Lane (total width) shall be removed without the specific approval of the Board of County Commissioners.

4. The Board of County Commissioners may make future changes in the width of the Traveled Burr's Lane it deems necessary for the health, safety, and welfare of the residents in the area and other users of the Traveled Burr's Lane.

5. Any adjacent property owner or other person desiring to landscape or otherwise encroach upon property within the Traveled Burr's Lane must receive written permission from the Board of County Commissioners. Any person desiring to maintain, grade, snowplow, salt or excavate within the Traveled Burr's Lane or to widen the Traveled Burr's Lane must receive written permission from the Board of County Commissioners. Any person desiring to place, keep, or maintain upon or across any part of the Traveled Burr's Lane or the Dedicated Burr's Lane any materials including, but not limited to, dirt, roadbase, refuse, rocks, fill or other building materials, must obtain written permission from the Board of County Commissioners. Failure to comply with these requirements will be considered violations of the ordinances of Salt Lake County and after proper investigation will be referred to the County Attorney for prosecution. The Sheriff of Salt Lake County, Salt Lake County Department of Public Works, and Development Services Division are by this resolution required to enforce its terms and requirements and immediately report any violation.

6. The boundaries of the Traveled Burr's Lane width shall be determined by the Public Works Department in conjunction with the Salt Lake County Surveyor's Office and clearly marked and defined where necessary.

7. This resolution reaffirms the width of Burr's Lane as it exists on the ground and is not intended to affect the status of the 33 foot wide Dedicated Burr's Lane which is located in the same general area and overlaps in some locations the road on the ground. By this resolution the County is not abandoning any claim to the 33 foot Dedicated Burr's Lane. The County will continue to have the right but not the obligation to make use of the 33 foot dedicated road.

APPROVED and ADOPTED this 17th day of August, 1994.

BOARD OF COUNTY COMMISSIONERS
OF SALT LAKE COUNTY

By _____
Chairman

ATTEST:

_____
Salt Lake County Clerk

att.rt.burrea2.ksl

APPROVED AS TO FORM
Salt Lake County Attorney's Office
By _____
Deputy County Attorney
Date: 8/15/94

11

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, DEPUTY COUNTY CLERK AND CLERK OF THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND AND THE SEAL OF SAID COUNTY THIS 18th DAY OF August 1994

SHERRIE SWENSEN
BY _____ DEPUTY
COMMISSION CLERK

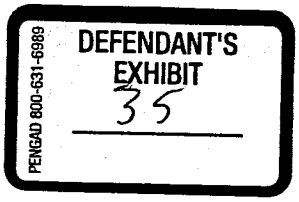
Tab Q

June 2001

ATTORNEY-CLIENT
PRIVILEGE

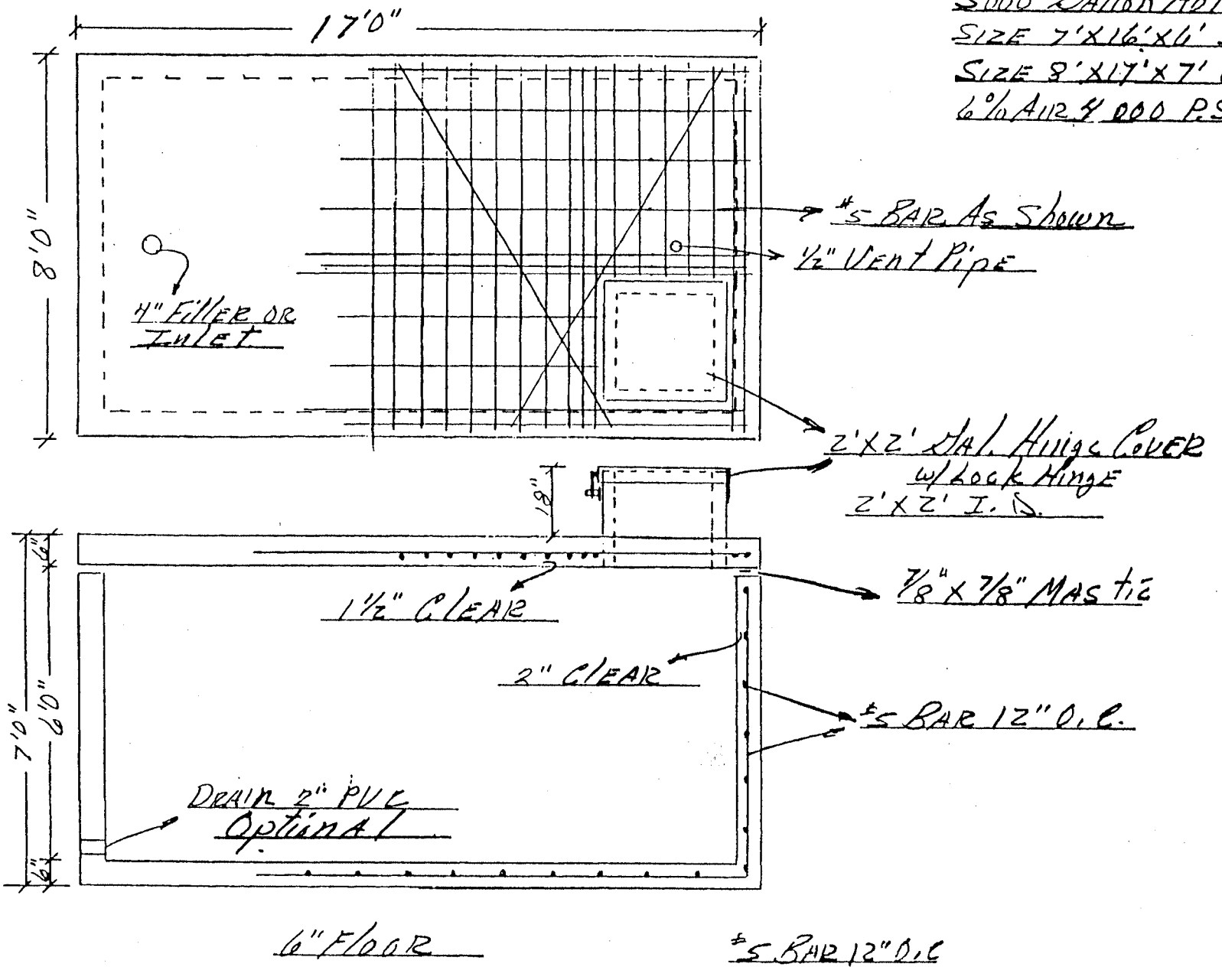
REDACTED

The previous year 2000 in a meeting with Tom Johnson and Brent Overson Mr. Overson suggested I fence my private property to prevent it being seen as public property.



Tab R

5000 Gallon Holding Tank
SIZE 7'X16'X6' I.D.
SIZE 8'X17'X7' O.D.
6% AIR 4000 P.S.I.



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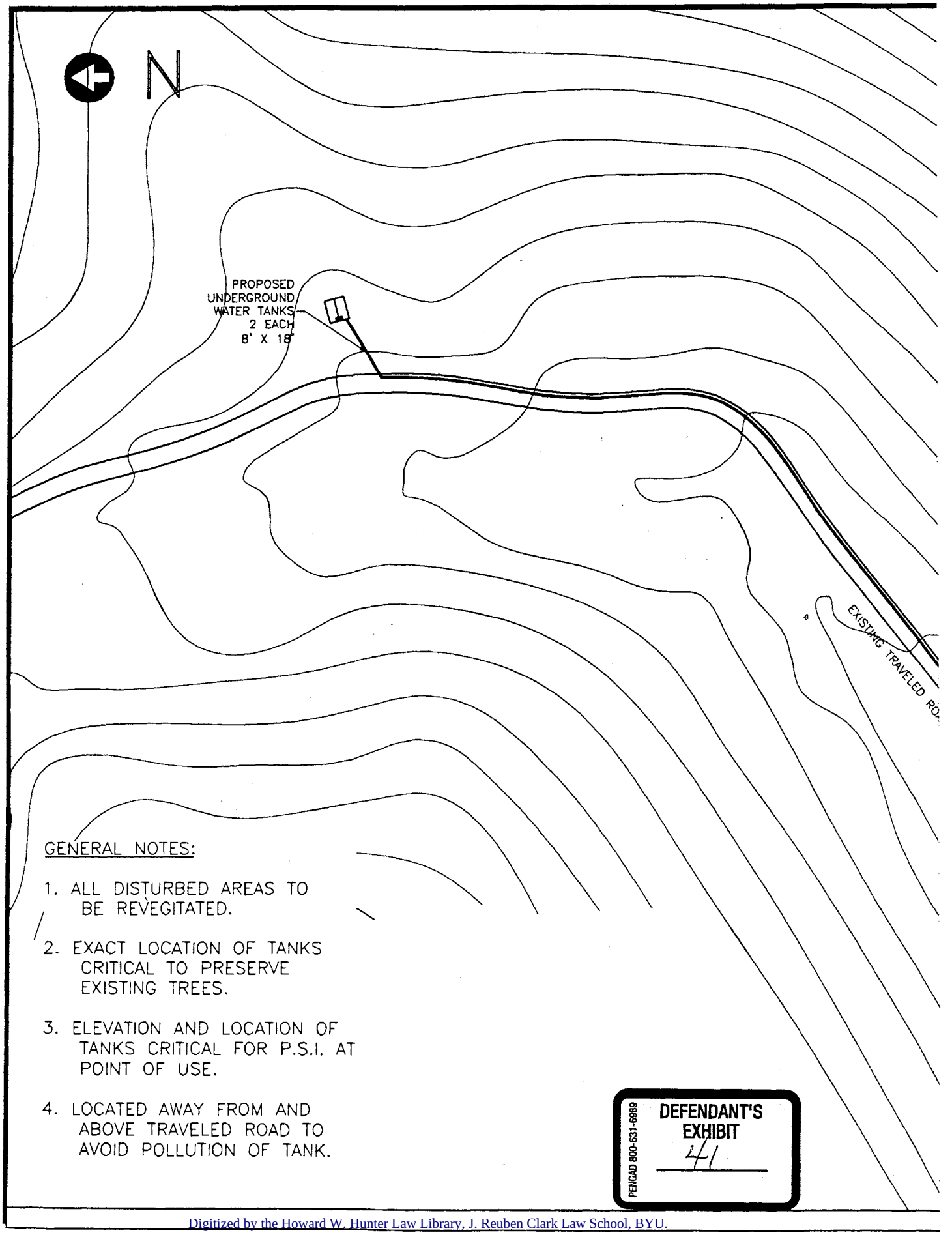
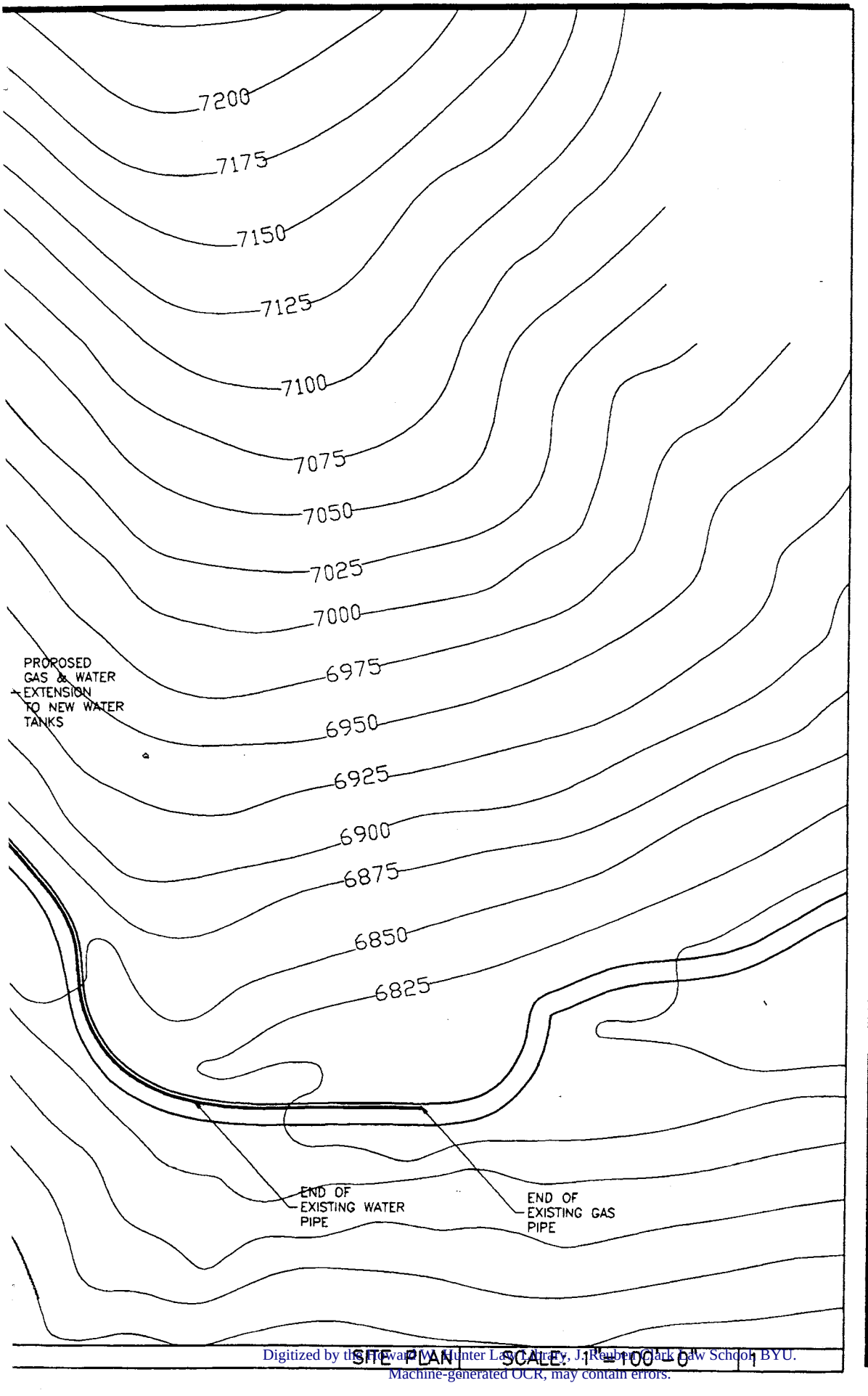


GENERAL NOTES:

1. ALL DISTURBED AREAS TO BE REVEGITATED.
2. EXACT LOCATION OF TANKS CRITICAL TO PRESERVE EXISTING TREES.
3. ELEVATION AND LOCATION OF TANKS CRITICAL FOR P.S.I. AT POINT OF USE.
4. LOCATED AWAY FROM AND ABOVE TRAVELED ROAD TO AVOID POLLUTION OF TANK.

PENGAD 800-631-6989

DEFENDANT'S EXHIBIT 41



SITE PLAN SCALE: 1" = 100'-0"

APPROVALS		
APPROVED BY:	INITIALS	DATE
LANDLORD		
LEASING		
ZONING		
RF		
E/P		
C.P.M.		

REVISIONS							
NO.	DATE	DESCRIPTION	BY	CHKD	APPD
0	5 AUG 1988	ZONING DRAWINGS	DAL		
1					

SITE INFORMATION

JOHN WALSH
EMIGRATION CANYON
SALT LAKE COUNTY, UTAH

DESIGN TYPE

WATER TANKS
&
WATER/GAS EXTENSION

SHEET TITLE

SITE PLAN

SHEET NUMBER	REV
A-1	0

Tab T

DEFENDANT'S EXHIBIT 90

PENCAD-Bayonne, N. J.

Tab U

DEFENDANT'S EXHIBIT 91

Tab V

Tab W

Tab X

Project: Turnaround
5100 North 5700 East

Ralph L. Denman P.L.S.
Salt Lake County Surveyor

S.L.Co. Engineering

TO PLAINTIFFS FIRST AMENDED CA

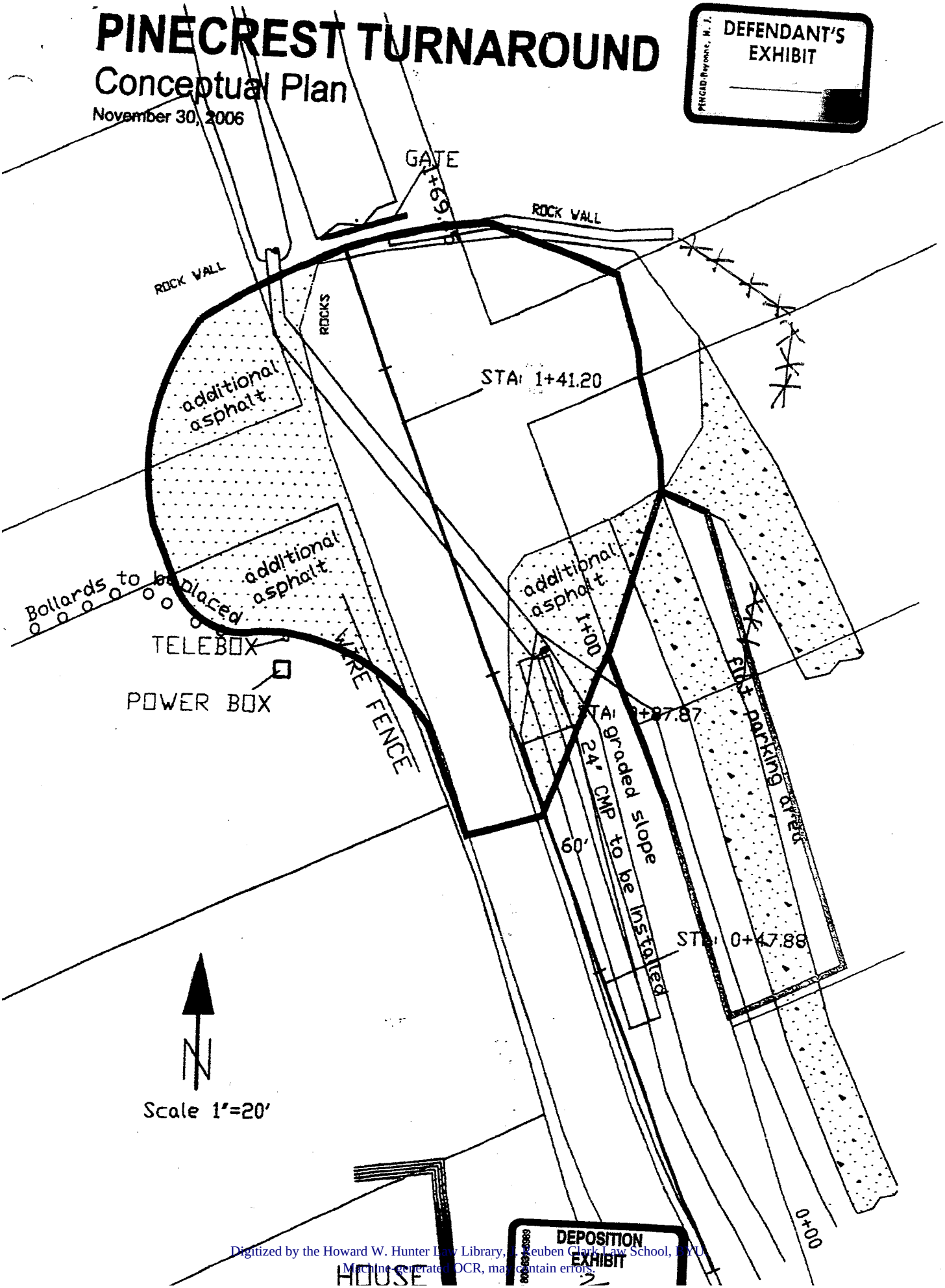
Tab Y

PINECREST TURNAROUND

Conceptual Plan

November 30, 2006

DEFENDANT'S EXHIBIT



Tab Z